Jurisdictional Statement

81-770

No. .....

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BARBARA BLUM, as successor in office to PHILIP L. TOIA, sued individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

against

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated, FREDDI MAE GOODWINE, LINDA SELDERS and GERTRUDE PARISH; CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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Question Presented

Do the provisions of the New York statute (Social Services Law, § 350-j(2)(c) and (e) and (3)) denying emergency cash assisatnce to recipients of Aid to Families with Dependent Children (42 USC § 601, et seq.) violate the equal Protection Clause of the Fourteenth Amendment to the Constitution?

Parties

The Parties to this appeal are set forth in the caption.

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No. .....

IN THE

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OCTOBER TERM, 1981

BARBARA BLUM, as successor in office to PHILIP L. TOIA, sued individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

against

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated, FREDDI MAE GOODWINE, LINDA SELDERS and GERTRUDE PARISH; CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

Appellant submits this statement pursuant to Rule 15 of the Rules of this Court to show that this case is within the Court's appellate jurisdiction and that such appeal is substantial, warranting full briefing and oral argument.

Opinions Below

The order of the Court of Appeals for the Second Circuit denying rehearing is unpublished and is reproduced at page 1a of the Appendix. The opinion of the Court of Appeals is published at 648 F. 2d 801; it is reproduced at page 3a thereof. The opinion of the District Court for the Southern District of New York is published at 493 F. Supp. 865; it is reproduced at page 22a thereof.

The lower courts also rendered the following opinions on non-constitutional issues which are not before the Court on this appeal and are not reproduced herein: Endorsed memorandum of the District Court dated July 1, 1977, denying defendant State Commissioner's motion to change venue (unpublished); opinion of the District Court granting summary judgment to plaintiffs, published at 437 F. Supp. 1371; summary affirmance of the Court of Appeals noted at 580 F.2d 1044; decision of the Court of Appeals dated August 21, 1978 granting defendant State Commissioner's petition for rehearing and remanding to the District Court for consideration of the case in the light of *Quern* v. *Mandley*, 436 U.S. 725 (1978) (unpublished); Opinion of District Court dated January 30, 1979 granting summary judgment to defendants on the plaintiffs' "Supremacy Clause" claim, (unpublished).

Jurisdiction

This action was brought pursuant to 42 U.S.C. § 1983; 28 U.S.C. § 1343(3) to enjoin the enforcement of New York Social Services Law § 450-j(2), (c), (e), (f), (3) as unconstitutional and/or contrary to the Federal Social Security Act.

The judgment of the Court of Appeals was entered on May 4, 1981. The order of the Court of Appeals denying rehearing was entered on July 22, 1981. The notice of

appeal was served on October 2, 1981 and filed in the U.S. Court of Appeals for the Second Circuit on October 5, 1981.

The jurisdiction of this Court to entertain this appeal rests on 28 U.S.C. § 1254(2).

Constitutional and Statutory Provisions Construed

U.S. Constitution, Amendment XIV, § 1, provides in pertinent part:

> "• • • No State shall • • • deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the United States of America (House Document No. 93-414, 93rd Congress, 2d Session, p. 21 [1975]).

New York Social Services Law provides in pertinent part.

> § 350-j. Emergency assistance to needy families with children.
>
> 1. Any inconsistent provisions of this chapter or of any other law notwithstanding, so long as federal aid is available therefor, a social services district shall provide emergency assistance as herein defined to persons eligible, including migrant workers with families.
>
> 2. For purposes of this section, the term "emergency assistance" means aid, care and services authorized during a period not in excess of thirty days in any twelve month period to meet the emergency needs of a child or the household in which he is living, in the following circumstances:
>
> (a) where the child is under twenty-one years of age; and
>
> (b) the child is living with, or within the previous six months has lived with, one or more persons speci-

fied in subdivision b of section three hundred forty-nine of this chapter; and

(c) *in cases of applications for grants of cash assistance, such child or such household is not categorically eligible for or receiving aid to dependent children;* and

(d) such emergency needs resulted from a catastrophic occurrence or from a situation which threatens family stability and which has caused the destitution of the child and/or household; and

(e) such occurrence or situation could not have been foreseen by the applicant, was not under his control *and, in the case of a person receiving public assistance, did not result from the loss, theft or mismanagement of a result public assistance grant;* and

(f) *the emergency grant being applied for will not replace or duplicate a public assistance grant already made under section one hundred thirty-one-a of this chapter.*

3. Emergency assistance to needy families with children shall be provided to the extent of items of need and services set forth in sections one hundred thirty-one and one hundred thirty-one-a of this chapter, and items of medical services set forth in section three hundred sixty-five-a of this chapter, and in amounts set forth in the regulations of the department for children who are without available resources, and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home, and such destitution or such need did not arise because such children or relatives refused without good cause to accept employment or training for employment. *Such emergency assistance, but not including cash grants, may be furnished to a family eligible for aid to dependent children only in the form of emergency services, and so long as federal aid remains available,*

for emergency fuel grants in the form of vendor restricted payments.
[4 Repealed.]

5. In scheduling investigations concerning applications for emergency assistance pursuant to this section local social services districts shall give priority to such applications. As amended, L.1977, c. 77, §§ 10, 11; L.1978, c. 473, § 8. (Emphasis added.)

McKinney's New York Social Services Law (1980-81 Supplement), pages 122-123.

§ 131-a Monthly grants and allowances of public assistance.

* * *

6. Notwithstanding any other provisions of this chapter or other law, a social services official may make provisions for the following items and services:

(a) replacement of necessary furniture and clothing for persons in need of public assistance who have suffered the loss of such items as the result of fire, flood or other like catastrophe, provided provisions therefor cannot otherwise be made;

(b) purchase of necessary and essential furniture required for the establishment of a home for persons in need of public assistance, providing provision therefor cannot otherwise be made;

* * *

(d) day care in a day care center, in a family home or provided "in home day care" provided the homemaker is employed, receiving occupational training, physically or mentaly incapacitated, or in cases where family duties away from home necessitate her temporary absence. * * *

* * *

McKinney's New York Social Services Law (1976), pages 217-218).

Statement of the Case

Appellees and the class they represent are recipients of Aid to Families with Dependent Children (AFDC), see 42 U.S.C. § 601, et seq., N.Y. Social Services Law § 131-a, who were denied Emergency Assistance (EA), 42 U.S.C. § 606(e), because the implementing New York State statute, N.Y. Social Services Law § 350-j rendered appellees, as AFDC recipients, inelegible for such assistance (although eligible for "items of need" and services), *Id.* § 350-j(2)(c) and (3). The law also precluded EA when the "emergency" resulted from the loss, theft, mismanagement or duplication of a public assistance grant, *Id.* § 350-j(2)(e)(f). Since the "emergency" in this case resulted from the loss of the proceeds of appellees' welfare checks, they were disqualified by these provisions, as well.

Appellees brought this action pursuant to 42 U.S.C. § 1983; 28 U.S.C. § 1343(3) to enjoin N.Y. Social Services Law § 350-j(2)(c), (e), (f) and (3), as being in violation of the Equal Protection Clause of the Fourteenth Amendment and the Federal Social Security Act (24-25a).*

As required by this Court's ruling in *Hagans* v. *Lavine,* 415 U.S. 528, 543-544 (1974), the District Court first addressed the issue of whether the State statute conflicted with the Federal Social Security Act and was therefore in violation of the Supremacy Clause, U.S. Const., Art. VI, § 2.

After certifying this suit to be a class action (*Bacon* v. *Toia,* 437 F. Supp. 1371, 1380-1383 [S.D.N.Y. 1977]), the District Court granted plaintiffs summary judgment on the "Supremacy Clause" issue, 437 F. Supp. at 1383-1388. The Court of Appeals affirmed on the opinion of the District Court, 580 F. 2d 1044 (2d Cir. 1978). Because of the pendency before this Court of *Quern* v. *Mandley,* 436 U.S.

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* Numbers in parentheses followed by "a" refer to pages of the appendix hereto.

725 (1978), the State Commissioner moved for rehearing or rehearing *in banc*. After *Quern* was decided, the Court of Appeals, on August 21, 1978, in an unpublished opinion, granted the petition for rehearing, recalled its decision and vacated the judgment of the District Court. It remanded the case for consideration in the light of *Quern* and to determine any other issues that might remain in the case in an unpublished opinion (25-26a).

On January 30, 1979, the District Court resolved the Supremacy Clause issue in favor of the defendants on the authority of this Court's decision in *Quern*. It then took additional submissions by the parties on the Equal Protection issues (26a).

In its decision of June 23, 1980 (22a), the District Court held that there was no basis or justification shown for the blanket disqualification of AFDC recipients from cash EA [§ 350-j(2)(c)]. In doing so, it rejected the State's contention that AFDC recipients were, in fact, treated identically with other persons (37-39a). However, the District Court held that the defficulty in verifying claims of lost or stolen cash was a sufficient rationale for excluding such occurrences from the scope of EA program [§ 350-j(2)(e)] (40-43a). The District Court also upheld the statutory denial of EA to replace or duplicate a public assistance grant as a means of limiting EA to specific crisis situations and to prevent EA from becoming a source of supplemental income to public assistances recipients [§ 350-j(2)(f)] (43-44a).

Both appellees (plaintiffs) and the State Commissioner appealed from the judgment of the District Court to the Court of Appeals for the Second Circuit to the extent it was unfavorable to them.*

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* Appellees abandoned their appeal from that portion of the judgment as upheld the non-duplication clause, N.Y. Social Services Law § 350-j(2)(f). The State Commissioner's cross-appeal included the question of the validity of that portion of the District Court's judgment as extended appellees' time to move for counsel fees under 42 U.S.C. § 1988 (8, 20-21a). This issue is not before the Court on this appeal.

The Court of Appeals for the Second Circuit affirmed the District Court's ruling on the Supremacy Clause issues pressed by the appellees, upholding the District Court's application of *Quern* v. *Mandley, supra,* to the case at bar (9-13a). Consequently, the Supremacy Clause issue is not now before the Court.

The Circuit also upheld the District Court in its rejection of the State's interpretation of N.Y. Social Services Law § 350(j)(2)(c) and (3), despite the failure of the appelles to controvert its affidavit and other documents by evidentiary material. It agreed with the District Court that the State's presentation had not satisfied it that treatment of AFDC and non-AFDC applicants was equivalent (14-17a).

However, the Court of Appeals reversed the District Court's holding that denial of EA because of the loss or theft of the proceeds of a public assistance grant was a reasonable classification under the Equal Protection Clause because such a loss is virtually impossible to verify, and in any event, that such verification would be expensive and time consuming. The Circuit Court read N.Y. Social Services Law § 350-j(2)(e) as establishing a presumption that proverty and immorality were synonymous (18a) and rejected the considerations of administrative efficiency approved by the District Court (19a).

The State Commissioner petitioned for rehearing, with a suggestion for rehearing *in banc.*

The petition cited the conflict between the Second Circuit's opinion and that of the Seventh Circuit in *Mandley* v. *Quern,* 635 F. 2d 659 (1980), which upheld as rational and thus, constitutional, Illinois statute denying EA for lost or stolen cash "because it is often impossible to verify", 635 F. 2d at 661.

The petition also pointed out that even if the Court of Appeals was unconvinced as to the State's interpretation of N.Y. Social Services Law § 350-j(2)(c) and (3), it should

not have made a factual determination that AFDC recipients were treated differently from others in view of appelees' failure to controvert the State's evidence. It also pointed out the anomaly in the Circuit's opinion caused by appelees' failure to press its appeal from the District Court's ruling on § 350-j(2)(f). In forbidding duplication of a grant, § 350-j(2)(f) would allow the State to deny EA in the same circumstances it would be withheld under § 350-j(2)(c) and (3), which latter provisions held to be a constitutional violation.

The petition for rehearing was denied (1a).

This Appeal Raises Substantial Questions Requiring Full Briefing and Oral Argument

The error of the Court of Appeals in the decision appealed from is profoundly disturbing in its departure from longstanding interpretation of Equal Protection in the context of the public assistance program, as expressed in *Dandridge* v. *Williams*, 397 U.S. 471 (1970) and its progeny. Invalidating New York's separate classification of AFDC recipients for purposes of emergency cash assistance, the Court below clearly held the State to a different and higher standard than what this Court has prescribed for such programs.

A.

This Court, in *Quern* v. *Mandley*, 436 U.S. 724, 743, *et seq.* (1978), held that Congress intended to give the States considerable latitude under the Social Security Act in determining those items of need they would cover under the various Emergency Assistance (EA) programs which drew upon matching federal funds. However, this Court never reached the constitutionality of any legislative choices made by the State of Illinois in formulating its EA program, 436 U.S. at 747, n. 22.

This appeal confronts the Court with just such a constitutional inquiry into the power of the States to determine, within its borders, the character of a "major welfare program," *Id.*, 436 U.S. at 734.

In holding that New York's exclusion of lost or stolen public assistance grants from the scope of its EA program irrationally discriminated against AFDC recipients, the Court of Appeals purported to apply this Court's standard that

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 612, 69-70. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan* v. *Maryland*, 366 U.S. 420, 426."

Dandridge **v.** ***Williams, supra,*** **397 U.S. at 485; principles reaffirmed in such cases as** ***Weinberger*** **v.** ***Salfi,*** **422 U.S. 749 (1975) and** ***Califano*** **v.** ***Aznavorian,*** **439 U.S. 170 (1978) (13-14a).**

While paying lip-service to the undeniable interest of the State in guarding against spurious claims, ***Jiminez*** **v.** ***Weinberger,*** **417 U.S. 628, 636 (1973); *Shapiro* v. *Thompson,* 394 U.S. 618, 637 (1969) (18a), the Second Circuit proceeded to substitute its judgment for that of the New York Legislature, which has undisputed power to estab-**

lish what needs are provided for by public welfare, *Quern* v. *Mandley, supra,* 436 U.S. at 738, as how best to achieve the goal of providing swift, emergency aid to those whom the Legislature determines are deserving, *Id.,* 436 U.S. at 744. The gratuitous suggestion by the Court of Appeals that the State could always verify the applicant's bona fides and recoup EA obtained through fraud at a later date (19a), serves to underscore the extent to which that court has encroached upon the power of the Legislature.

The diametrically opposite result was reached in *Mandley* v. *Quern,* 635 F. 2d 659, 661 (7th Cir. 1980). In that case, the Seventh Circuit approved as rational and therefore constitutional, Illinois' exclusion of stolen cash from its EA programs, noting that "[l]oss due to theft of cash is not covered because it is often impossible to verify."

This division between the Second and Seventh Circuits further demonstrates the need for plenary consideration of this case. Only the Court can resolve what is already a multi-state constitutional dilemma.

B.

The Court below further erred in discounting the State's affidavit and other documents which showed that in practice AFDC recipients are eligible for the same emergency cash assistance as other needy individuals and families (14-16a).* Specifically, the State, through the affidavit of

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* Although, the Court of Appeals determined the State's interpretation of the statute to be incorrect, of the state cases it cited (17a), *Howard* v. *Wyman,* 28 N Y 2d 434, 438 n. 3, 271 N.E. 2d 528, 530, n. 3, 322 N.Y.S. 2d 683, 686, n. 3 (1971) suggested the availability of EA; in both *Nazaro* v. *New York Commissioner of Social Services,* 37 A D 2d 630, 323 N.Y.S. 2d 618, 619 (2d Dept. 1971), decided before the amendments to § 350-j were enacted and *Orr* v. *Shang,* 66 A D 2d 784, 410 N.Y.S. 2d 654, 655 (2d Dept. 1978), decided thereafter, the courts held that AFDC recipient should *receive* EA as a result of an event held not covered by New York Social Services Law § 131-a(6).

a responsible official, maintained that the AFDC special grants set forth in N.Y. Social Services Law, § 131-a(6) are equivalent to what a recipient of the State's Home Relief Program receive as emergency assistance under *id.* § 350-j; indeed, that in practice *all* public assistance recipients—whether AFDC, Home Relief—are treated identically in such situations without distinction as to program. Thus, in practice, AFDC recipients are not discriminated against because the statute denied them cash EA on an equal basis with other EA applicants; and all § 350-j(2)(c) did was prohibit the duplication of grants in the same manner as § 350-j(2)(f), a provision upheld by the District Court and as to which appellees abandoned their appeal. (32-33a).

This affidavit was never, in any way, controverted by appelles. Nevertheless, the Court below did not defer to the agency's interpretation of the statute, as prescribed by this Court in *Quern* v. *Mandley, supra,* 436 U.S. at 738; *Dublino* v. *New York Department of Social Services,* 413 U.S. 405, 420-421 (1973); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). Moreover, despite Fed R. Civ. P. Rule 56(e) which would require answering affidavits from appellees on pain of an adverse ruling, the lower courts erroneously rendered judgment in favor of appellees, *United States* v. *Bosurgi,* 530 F. 2d 1105, 1111-1112 (2d Cir. 1976).

If there remained any doubt as to the scope of coverage afforded the two classes of EA applicants, summary judg-

ment for the appellees (plaintiffs) was clearly improper the duty of the Court of Appeals was either to order a trial, *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 467 (1962).

In any event, the lower courts' holding as to § 350-j(2)(c) was error and should be reversed.

CONCLUSION

Probable jurisdiction should be noted.

Dated: New York, New York
October 20, 1981

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellant

SHIRLEY ADELSON SIEGEL
Solicitor General

ROBERT S. HAMMER
Assistant Attorney General
of Counsel

Appendix

Order Denying Rehearing, Filed July 22, 1981.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of July, one thousand nine hundred and eighty-one.

No. 80-7725
80-7745

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated,

Plaintiffs-Appellants-Cross-Appellees,

and

FREDDIE MAE GOODWIN, LINDA SELDERS and GERTRUDE PARRISH,

Plaintiffs-Intervenors-Appellants-Cross-Appellees,

v.

PHILIP L. TOIA, individually and as Commissioner of the Department of Social Services of the State of New York,

Defendant-Appellee-Cross-Appellant,

CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Defendant.

Order Denying Rehearing.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee-cross-appellant, Philip L. Toia, individually and as Commissioner of the Department of Social Services of the State of New York,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested a vote be taken thereon.

A. Daniel Fusaro,
A. DANIEL FUSARO
Clerk

by Francis X. Gindlart
Chief Deputy Clerk

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 491, 602—September Term, 1980

(Argued December 18, 1980 Decided May 4, 1981)

Last brief filed February 4, 1981

Docket No. 80-7725, 7745

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated,

Plaintiffs-Appellants-Cross-Appellees,

and

FREDDIE MAE GOODWINE, LINDA SELDERS and GERTRUDE PARRISH,

Plaintiffs-Intervenors-Appellants-Cross-Appellees,

—v.—

PHILIP L. TOIA, individually and as Commissioner of the Department of Social Services of the State of New York,

Defendant-Appellee-Cross-Appellant,

CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Defendant.

Opinion of the Court of Appeals.

Before:

FEINBERG, *Chief Judge*, KEARSE, *Circuit Judge*, and EDELSTEIN, *District Judge*.*

Appeal from judgment of the United States District Court for the Southern District of New York, Lee P. Gagliardi, J., granting in part and denying in part plaintiffs' motion to enjoin enforcement of certain provisions of New York State's emergency assitance program, N.Y. Soc. Serv. L. § 350-j.

Affirmed in part and reversed in part.

MARTIN A. SCHWARTZ, Westchester Legal Services, Inc., White Plains, NY (Eileen Kaufman, Westchester Legal Services, Inc., Constance Carden, Legal Aid Society, New York, NY, of Counsel), *for Plaintiffs-Appellants-Cross-Appellees.*

ROBERT S. HAMMER, New York, NY, Assistant Attorney General of the State of New York (Robert Abrams, Attorney General of the State of New York, George D. Zuckerman, Assistant Soliciter General, of Counsel), *for Defendant-Appellee-Cross-Appellant.*

RANDOLPH W. GAINES, Chief of Litigation, Richard W. Hubbard, Attorney, Office of General Counsel, Department of Health and Human Services, Baltimore, MD (Alice Daniel, Assistant Attorney General, Washington, DC, John S. Martin, United States Attorney for the Southern District of New York, of Counsel), *for the Secretary of Health and Human Services as Amicus Curiae.*

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* Honorable David N. Edelstein, Judge of the United States District Court for the Southern District of New York, sitting by designation.

Opinion of the Court of Appeals.

FEINBERG, *Chief Judge:*

This class action for declaratory and injunctive relief under 42 U.S.C. § 1983 challenges the constitutionality of certain amendments adopted in 1977 to section 350-j of the New York Social Services Law,[1] the provision governing

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[1] As amended by 1977 N.Y. Laws ch. 77, § 10, the portions of the statute at issue here read:

> 2. For purposes of this section, the term "emergency assistance" means aid, care and services authorized during a period not in excess of thirty days in any twelve month period to meet the emergency needs of a child of the household in which he is living, in the following circumstances:
>
> . . . . . .
>
> (c) in cases of applications for grants of cash assistance, such child or such household is not categorically eligible for or receiving aid to dependent children; and
>
> . . . . . .
>
> (e) such occurrence or situation could not have been foreseen by the applicant, was not under his control and, in the case of a person receiving public assistance, did not result from the loss, theft or mismanagement of a regular public assistance grant; and
>
> (f) the emergency grant being applied for will not replace or duplicate a public assistance grant already made under section one hundred thirty-one-a of this chapter.
>
> 3. Emergency assistance to needy families with children shall be provided to the extent of items of need and services set forth in sections one hundred thirty-one and one hundred thirty-one-a of this chapter . . . . Such emergency assistance, but not including cash grants, may be furnished to a family eligible for aid to dependent children only in the form of emergency services . . . .

the state's program of emergency assistance to needy families with children.[2] We conclude that the statute, as amended, is not invalid under the Supremacy Clause of the Constitution, but we hold that the two particular provisions raised in this appeal—one denying cash emergency assistance to persons eligible for or receiving Aid to Families with Dependent Children (AFDC)[3] and the other denying all forms of mergency assistance in cases of loss or theft of a public assistance grant—deny the members of the plaintiff class of AFDC recipients the equal protection of the laws guaranteed by the Fourteenth Amendment. Accordingly, we affirm in part and reverse in part the judgment of the district court, and enjoin enforcement of the constitutionally defective provisions.

I

The named original and intervening plaintiffs, recipients of benefits under New York's AFDC program, brought this

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[2] The emergency assistance program is operated by the state but, so long as federal requirements are met, receives substantial funding under provisions of Title IV-A of the Social Security Act added in 1968. See 42 U.S.C. §§ 603(a)(5), 606(e); 45 C.F.R. § 233, 120(b)(2) (1980). For a more detailed account of the purposes and operation of the program, see Judge Gagliardi's opinion in this case. Bacon v. Toia, 493 F. Supp. 865, 868-69 (S.D.N.Y. 1980).

[3] Like the emergency assistance program, AFDC is administered by the state under the authority of Title IV-A of the Social Security Act, 42 U.S.C. § 601 et seq. The general purpose of the program, inaugurated as part of the original 1935 Act, is to "encourag[e] the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State," to needy children and their parents and relatives. 42 U.S.C. § 601.

action in 1977 to enjoin enforcement of certain amendments adopted in that year to the state's emergency assistance program, the effect of which was to limit and in some circumstances to deny such assistance to AFDC recipients. Plaintiffs initially moved for summary judgment in the United States District Court for the Southern District of New York, before Judge Lee P. Gagliardi. In September 1977, in an opinion reported at 437 F. Supp. 1371, Judge Gagliardi granted the motion on the ground that the amendments impermissibly narrowed the eligibility standards for emergency assistance imposed on the states by federal law—specifically, section 406(e) of the Social Security Act, 42 U.S.C. § 606(e)—and was thus invalid under the Supremacy Clause. We affirmed in an unpublished memorandum order, accepting the analysis of the district court's opinion. 580 F.2d 1044 (2d Cir. 1978). Shortly thereafter, however, the Supreme Court, in Quern v. Mandley, 436 U.S. 725 (1978), held that section 406(e) did not preclude the states from setting eligibility standards for emergency assistance more narrowly than for AFDC benefits. Defendants moved for rehearing in this court in light of *Quern;* granting their motion, we recalled our order of affirmance, vacated the judgment of the district court, and remanded the action for further consideration and for resolution of any remaining issues, if necessary.

On remand, the district court granted defendants' motion for summary judgment on the Supremacy Clause claim in an opinion dated January 30, 1979, reversing its prior decision and concluding that the New York statute as amended was valid under the Supreme Court's "definitive statutory interpretation" of section 406(e) of the Social Security Act. At the same time, the court gave the parties leave to file further briefs addressed to the constitutional issues.

Finally, in June 1980, in an opinion reported at 493 F. Supp. 865, Judge Gagliardi held that one of the challenged amendments, the provision denying emergency assistance in the form of cash to persons receiving or eligible for AFDC assistance (the "no-cash provision"),[4] deprived plaintiffs of the equal protection of the laws. The court upheld, however, the other amended provisions cited in the complaint, one barring emergency assistance in any case of loss, theft, or mismanagement of a regular public assistance grant (including AFDC) (the "loss-or-theft provision")[5] and the second prohibiting emergency assistance to replace or duplicate certain recurring public assistance grants (the "duplication provision").[6] In the final judgment entered pursuant to the court's opinion, Judge Gagliardi reserved the issue of attorneys' fees, costs, disbursements for determination on motions to be made within three months after completion of all appellate proceedings in this case.

In this court, plaintiffs appeal from the district court's ruling on the Supremacy Clause claim,[7] and from that part of the judgment upholding the loss-or-theft provision. They do not attack the ruling with respect to the duplication provision. Defendant Commissioner of the Department of Social Services of the State of New York (the "Commissioner") cross-appeals from the part of the

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[4] N.Y. Soc. Serv. L. § 350-j(2)(e), note 1 supra. The limitation of aid to "services" is reiterated in § 350-j(3).

[5] N.Y. Soc. Serv. L. § 350-j(2)(e), note 1 supra. See also note 11 infra.

[6] N.Y. Soc. Serv. L. § 350-j(2)(f), note 1 supra.

[7] Following oral argument of this appeal, we requested the Secretary of Health and Human Services to submit a brief as amicus curiae addressed to this issue. The Secretary's brief, which has been helpful to the court, was filed in January 1981.

judgment striking down the no-cash provision and from the order reserving the issue of attorneys' fees.

II

We turn first to plaintiffs' claim that the district court erred in finding no conflict under the Supremacy Clause between the amended New York statute and the emergency assistance eligibility standards set by the federal Social Security Act. Plaintiffs' essential argument is that the Supreme Court's decision in Quern v. Mandley, supra, does not control this case; they point instead to our own earlier decision in Lynch v. Philbrook, 550 F.2d 793 (2d Cir. 1977). In *Lynch,* we struck down a Vermont statute that sharply limited AFDC recipients' entitlement to emergency assistance,[8] reasoning that the emergency assistance program as defined in the Social Security Act "was designed to cover, at a minimum, AFDC recipients," id. at 796, and that while the program was "only an optional component of AFDC, once Vermont decided to participate in it, it was bound to follow the eligibility conditions established by federal law." Id. at 795. Those conditions, set out in section 406(e) of the federal statute, we treated as a "mandate." Id.

Though the Supreme Court in *Quern* made no specific reference to *Lynch,*[9] it held squarely that section 406(e) does not "impose [ ] mandatory eligibility standards on States that elect to participate in the [emergency assistance] program"; rather, it "defines the *permissible scope*" of such programs "for purposes of federal funding," 436

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[8] The statute required that AFDC recipients show an "emergency need" attributable to one of four specified causes; other qualified persons had only to show the existence of an "emergency need." See 550 F.2d at 795.

[9] Plaintiffs note in this connection that *Lynch* was cited in the Supreme Court briefs of both sides in *Quern,* indicating that the Court was certainly not unaware of its existence.

U.S. at 747 (emphasis in original). The statute thus does not preclude the states from establishing more restrictive standards of eligibility; as the Court observed, "the very breadth of the potential reach of [emergency assistance]—to virtually any family with needy children of a certain age that faces a risk of destitution—argues against the inference that Congress intended to require participating States to extend aid to *all* who were potentially eligible under § 406(e)." Id. at 745-46 (emphasis in original).

Plainitffs contend that the issue in this case and in *Lynch* is not, as it was in *Quern*, whether states may define eligibility for emergency assistance more stringently than does section 406(e), but rather "whether [section 406(e)] allows the states to run an Emergency Assistance program . . . that treats AFDC eligible persons worse than other persons." In this connection, they point to our express recognition in *Lynch* that we did not there "face . . . the issue of how freely a state can define what constitutes an emergency for which [emergency assistance] will be paid," 550 F.2d at 797, the issue with which *Quern* was essentially concerned. In *Lynch*, we held "only that AFDC recipients need show no more pressing emergency than those not on AFDC." Id. This holding, plaintiffs argue, is still valid after *Quern* and requires that the statutory provisions challenged here be struck down under the Supremacy Clause. Inndeed, they point out, the provisions before us now go even further than those at issue in *Lynch*, since they do not even permit AFDC recipients to obtain emergency assistance by meeting a heavier burden—they are simply cut off altogether in the specified circumstances.

Plaintiffs' distinction of *Quern* has a certain appeal, but we find it ultimately unpersuasive. To apply *Lynch* at this stage, we would have to ignore the clear import of the Court's reasoning in *Quern:* that Congress intended to leave to the states substantial flexibility in determining the scope of emergency assistance programs suitable under local conditions. Beyond setting outside limits on eligibil-

ity for programs that qualify for federal funding, Congress provided no statutory basis for invalidating a state's decision in this area. Our view that this is the proper reading of *Quern* is strengthened by the Court's specific acknowledgement in that case, with no suggestion of disapproval, that some states (like New York) "*exclude* AFDC recipients if the emergency need is one theoretically covered by the basic assistance grant . . . ." 436 U.S. at 740 n. 16 (emphasis in original).

We conclude, then, that *Quern* bars plaintiffs' challenge under the Supremacy Clause based on an allegation of conflict with section 406(e) of the Social Security Act. In so doing, we do not mean to say that *Quern* licenses any form of state classification for emergency assistance; state programs of course remain subject to review, as we discuss below, on constitutional grounds.

A somewhat different Supremacy Clause argument appears in the amicus brief of the Secretary of Health and Human Services, requiring separate analysis. The Secretary argues that *Quern* is not dispositive because it dealt only with section 406(e); here, the Secretary asserts, the conflict arises instead between the amended New York statute and section 402(a)(5) of the Social Security Act, 42 U.S.C. § 602(a)(5). This section provides that "[a] State plan for aid and services to needy families with children [i.e., an emergency assistance program] must . . . provide such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan." Acting pursuant to the rulemaking authority delegated by section 1102 of the Act, 42 U.S.C. § 1302, the Secretary has promulgated regulations defining such "methods of administration" and setting forth other requirements for state emergency assistance plans. One of these regulations, codified at 45 C.F.R. § 233.10(a)(1), provides in part:

The groups selected for inclusion in the plan and the

> eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act.

The Secretary takes the position that this regulation "creat[es] a permissible limit upon the discretion otherwise allowed the States by § 406(e) of the Act because the regulation is a legislative-type rule, itself having the force of law." As such, the Secretary argues, the regulation is entitled, under Batterton v. Francis, 432 U.S. 416, 425-26 (1977), to "more than mere deference or weight." Since the provisions of the New York statute at issue here discriminate against AFDC recipients "without relation to the purpose of the [emergency assistance] program," the Secretary would have us find them invalid under the Supremacy Clause by virtue of their conflict with the Secretary's regulation.

Our initial difficulty with this argument, as with the argument pressed by plaintiffs, is that it seeks to evade the thrust of *Quern* that Congress intended to leave eligibility determinations to the states. Indeed, the argument requires a conclusion that what Congress gave to the states in section 406(e) it reclaimed in section 402(a)(5) by leaving the Secretary a residual authority to evaluate the states' decisions for "arbitrariness," "unreasonableness," or "inequity." In view of the reasoning in *Quern*, we would not feel justified in accepting that view. We conclude, therefore, that in authorizing the Secretary to prescribe "methods of administration" for state emergency assistance programs, Congress did not confer an administrative power to review eligibility determinations that do not conflict with section 406(e). To the extent that the

Secretary's regulation asserts such power, it exceeds the scope of authority delegated by the statute and is thus not entitled to judicial deference. See Batterton v. Francis, supra, 432 U.S. at 426.[10]

In sum, we affirm the district court's decision on the Supremacy Clause claim and reject the Secretary's contention that section 402(a)(5) provides an alternative basis for such an argument. Having considered these statutory issues, we may now turn to the constitutional arguments raised by both sides. See New York City Transit Authority v. Beazer, 440 U.S. 568, 582-833 (1979).

III

The constitutional issues raised in this case concern the validity of the classifications drawn by the New York legislature in the no-cash provision and the loss-or-theft provision[11] of the emergency assistance statute. We agree

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[10] The Secretary argues that the language of section 402(a)(5) is "hardly different from" that of Section 407(a), the provision at issue in Batterton v. Francis. We disagree, Section 407(a) delegated authority to the Secretary to prescribe standards for determining what constitutes "unemployment," and in so doing reflected a congerssional decision to "entrust[ ] to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term." 432 U.S. at 425. The language of section 402(a)(5), on the other hand, contemplates no such substantive authority on the Secretary's part for the definition of statutory terms, it refers instead to the promulgation of administrative regulations designed to promote "proper and efficient operation" of the AFDC program.

[11] The statute also prohibits emergency assistance to replace "mismanage[d]" public assistance grants, see N.Y. Soc. Serv. L. § 350-j(2)(e), note 1 supra. The district court ruled that plaintiffs in this action lacked standing to challenge this part of the statute, see 437 F. Supp. at 1385 n. 12, and plaintiffs do not contest that ruling in this court. Accordingly, we do not reach the constitutionality of this limitation.

with the district court—and the parties—that the standards applicable to this inquiry are those set forth in Dandridge v. Williams, 397 U.S. 471, 485-87 (1970), and decisions that have followed it, such as Weinberger v. Salfi, 422 U.S. 749 (1975). These decision recognize that in the area of social welfare legislation states may draw lines, even imperfect ones, provided they rest on a rational basis and are free of invidious discrimination. As the Court stated in *Dandridge, supra:*

> If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

397 U.S. at 485 (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

A. *The No-Cash Provision.*

We turn first to the Commissioner's appeal from the district court's holding that section 350-j(2)(c) and (3) was unconstitutional in denying emergency assistance in the form of cash (but not services) to persons receiving or eligible for AFDC benefits. Judge Gagliardi based this conclusion on his finding that the provision "arbitrarily denies emergency aid in the form of cash to one category of potential beneficiaries of the statute without any demonstration that the resulting classification advances a legitimate, articulated state purpose."

The Commissioner here makes no attempt to show that a valid purpose does underlie this provision, arguing instead that the district court erred in finding that it results in different treatment for AFDC recipients. In support of this argument, the Commissioner cites an affidavit, dated October 31, 1978, by the Director of the Income Support Unit of the Division of Income Main-

tenance of the New York State Department of Social Services. This affidavit asserts that the no-cash provision, contrary to the appearance of its plain language, "does *not* discriminate against [AFDC] recipients" because:

> the *only* occasions in which emergency assistance in the form of cash would be provided to a Home Relief recipient [New York's "residual public assistance program," see 493 F. Supp. at 870 n. 7] would be for those situations in which an [AFDC] recipient would be eligible for a cash grant as part of the [AFDC] program. Examples of these situations are set forth in Section 131-a of the Social Services Law such as replacement of furniture and clothing as a result of fire, flood or other like catastrophe. Since cash assistance is provided to *all* public assistance recipients in identical circumstances, there is no discrimination because the source of the cash assistance program is irrelevant to the recipient.

(Emphasis in original.) Judge Gagliardi did not refer to this portion of the affidavit in his opinion, but he did consider the significance of a directive from the state's Department of Social Services issued shortly after the amended statute took effect and making essentially the same point.[12] See 493 F. Supp. at 872-73. He concluded,

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[12] The record includes two other documents along similar lines. One is a "Program Guide Transmittal" issued by the Westchester County Department of Social Services on August 9, 1977, explaining to department personnel the changes made by the 1977 amendments. Under the heading "Eligibility Criteria," the transmittal advises:

> FAMILIES ELIGIBLE FOR ADC [AFDC] ARE INELIGIBLE FOR DIRECT OR INDIRECT CASH GRANTS IN THE EAF [EMERGENCY ASSISTANCE] CATEGORY SINCE SPECIFIC EMERGENCY NEEDS CAN BE MET THROUGH THE REGULAR ADC PROGRAM.

(footnote continued on following page)

however, that the interpretation of the statute given in the directive was without any substantiating support in the record and therefore declined to accept it as a satisfactory explanation of the no-cash limitation.

The affidavit pressed on us by the Commissioner suffers from the same absence of apparent support in the record. It appears to be little more than ipse dixit, substantially varying the plain language of the statute. As such, we agree with the district court that it does not constitute an authoritative administrative interpretation warranting judicial deference. Cf. Udall v. Tallman, 380 U.S. 1, 16 (1965).

Moreover, a review of the statutes and cases interpreting them indicates to use that the interpretation given in the affidavit is simply not correct. It is true, as the affidavit asserts, that N.Y. Soc. Serv. L. § 131-a(6) permits extraordinary relief to AFDC recipients, beyond regular monthly benefits, in certain defined circumstances —circumstances in which persons not receiving monthly AFDC benefits would be able to seek relief through the emergency assistance program. See id. § 350-j(3). But we cannot accept the contention that the two programs are coterminous. Section 131-a(6), for example, permits grants for replacement of furniture or clothing lost as the

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Like the directive cited by Judge Gagliardi, however, the transmittal offers no further explanation of how the AFDC program meets all the needs otherwise covered by the emergency assistance program.

Also in the record is a document identified by counsel for the Commissioner as a memorandum of the state Division of the Budget, prepared for the legislature in support of the bill containing the amendments. This memorandum asserts that the amendments "should have little direct impact on the Aid to Dependent Children caseload, since those needs previously recognized under State regulations would continue to be made as items of special need under the ADC program, rather than under EAF."

result of "fire, flood or other like catastrophe"; it does not permit grants in cases of loss attributable to burglary, see, e.g., Howard v. Wyman, 28 N.Y.2d 434 (1971), or public auction following eviction, see, e.g., Orr v. Shang, 66 A.D. 2d 784 (1978); Nazario v. New York Commissioner of Social Services, 37 A.D.2d 6630 (1971). Emergency assistance grants are not so limited, see Orr v. Shang, supra, 66 A.D.2d at 784. Furthermore, section 131-a(6) makes no provision for grants to meet food and other immediate living expenses—expenses for which grants can be made under the emergency assistance program.

On this record, therefore, we conclude that the Commissioner has not made a satisfactory showing that section 350-j(2)(c) and (4) does not, in fact, discriminate against AFDC recipients. Since the Commissioner has not even attempted to offer a "reasonable basis" for this discrimination, we agree with the district court that the no-cash provision violates the guarantees of the Equal Protection Clause.

B. *The Loss-or-Theft Provision.*

As amended in 1977, N.Y. Soc. Lerv. L. § 350-j(2)(e) prohibits the extension of emergency assistance of any kind to persons receiving public assistance if the emergency arose "from the loss, theft, or mismanagement of a regular public assistance grant." "Public assistance" in New York includes AFDC benefits, together with "home relief, veteran assistance . . . , medical assistance for needy persons, institutional care for adults and child care granted at public expence . . . ." Id. § (20). The district court held that this provision rationally served a legitimate state interest—namely, "to prevent duplicate payments to public welfare recipients who might feign the loss of theft of the proceeds of a grant." 493 F. Supp. at 874. The court found further that the state could reason-

ably conclude that verification of claims of loss or theft would be virtually impossible and, in any event, expensive and time-consuming. In addition, the court found that there were no "viable alternatives" available to the state to protect against spurious claims. Under these circumstances, the court found that the statute, even though based on a classification that is "both over-inclusive and under-inclusive," met the equal protection standards enunciated in Weinberger v. Salfi, supra, and Dandridge v. Williams, supra.

We have no quarrel with the legitimacy of the interest that the state seeks to protect here; as the Commissioner points out, the protection of public resources against fraudulent or spurious claims is a proper and even necessary legislative concern. See, e.g., Jiminez v. Weinberger, 417 U.S. 628, 636 (1974); Shapiro v. Thompson, 394 U.S. 618, 637 (1969). Our difficulty is in seeing how the clasisfication drawn by the New York legislature reasonably relates to this concern, even as a "rough accommodation." See *Dandridge,* supra, 397 U.S. at 485.

Section 350-j(e)(e) draws a line between recipients of public assistance, including plaintiffs in this action, and all others eligible for emergency assistance, including persons receiving public payments such as social security benefits, supplemental security income (SSI) benefits, unemployment compensation, or workers' compensation. There is, however, nothing in the record to establish that public assistance recipients have a greater propensity than others for asserting fraudulent claims of lost or stolen funds, and such a propensity is not to be presumed. "Poverty and immorality are not synonymous." Edwards v. California, 314 U.S. 160, 177 (1941). Where there is an equal potential for fraud among those in each of two classes, it is not reasonable on this basis to treat those classes differently. The Supreme Court has left no room

for doubt in this area. Striking down a closely analogous classification in the Social Security Act in Jimenez v. Weinberger, supra, 417 U.S. at 637, the Court stated:

> [F]or all that is shown in this record, the two subclasses of illegitimates [affected by the statutory provision at issue] stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws . . . .

See also United States v. Clark, 445 U.S. 23, 30-31 (1980).

Finally, we do not argee with the district court that considerations of administrative efficiency are sufficiently compelling to sustain the lines drawn by the statute. While we do not doubt the difficulties involved in verifying claims of lost or stolen cash, we see no basis for concluding that verification of claims by persons not receiving public assistance—who are not denied the opportunity to document their losses—is any easier than the verification of claims by AFDC and other public assistance recipients. Nor are we persuaded that the state lacks any alternative means of protection that would be less burdensome to one class of people. Indeed, as plaintiffs note, the state may recoup fraudulently obtained public assistance benefits from future payments, a remedy that may not be available in the case of persons not receiving public assistance. In sum, while we recognize that legislature of this kind always "involves drawing lines among categories of people, lines that necessarily are sometimes arbitrary," Califano v. Aznavorian, 439 U.S. 170, 174 (1978), the line-drawing process must itself rest on a rational foundation. Id. In this case, we conclude that it did not.

IV

We turn finally to the Commissioner's cross-appeal from the provision in the district court's order permitting plaintiffs to seek attorneys' fees, costs, and disbursements "upon appropriate motion made within three (3) months after the completion of all appellate proceedings herein." Relying principally on White v. New Hampshire Department of Employment Security, 629 F.2d 697 (1st Cir. 1980), the Commissioner argues that applications for attorneys' fees pursuant to 42 U.S.C. § 1988 must be made within ten days after the entry of judgment in the district court, in conformity with the time limit imposed by Fed. R. Civ. P. 59(e).[13]

We note in passing that the view adopted in *White* has not been followed by some other courts, see Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980); Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980). In this case, however, we need not enter this area of dispute. We are satisfied that Judge Gagliardi acted within his power in reserving the issue of fees, together with costs and disbursements, for subsequent action. Indeed, this exact device was suggested by the First Circuit panel in *White* as a means of circumventing the strictures of Rule 59(e) when appropriate to do so. See 629 F.2d at 704. Moreover, the reservation of these issues in this case does not raise problems of finality that might arise in other circumstances, see id.; since the judgment here was one granting in part and denying in part plaintiffs' motion for an injunction, it is appealable even as an interlocutory order under 28 U.S.C. § 1292(a)(1). Finally, we do not believe that the judge abused his discretion in allowing plaintiffs

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[13] The Rule provides: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

three months to file their motion. This is not an unreasonable length of time for litigation that has now been in the courts for four years.

Accordingly, we will not disturb the district court's order on this issue.

V

Having concluded that the loss-or-theft provision of New York's emergency assistance program denies plaintiffs the equal protection of the laws, we reverse the judgment of the district court with respect to this provision and enjoin its enforcement. In all other respects, the judgment of the district court is affirmed.

Opinion of the District Court.

Jeanne BACON, Individualy and on behalf of her minor children Robert Bacon and Ife Bacon, and on behalf of all other persons similarly situated, Plaintiffs,

v.

Philip L. TOIA, Individually and as Commissioner of the Department of Social Services of the State of New York, and Charles W. Bates, Individualy and as Commissioner of the Westchester County Department of Social Services, Defendants.

No. 77 Civ. 2823(LPG).
United States District Court,
S. D. New York.

June 23, 1980.

Westchester Legal Services, Inc., White Plains, N. Y., for plaintiffs; Martin A. Schwartz, White Plains, N. Y., of counsel.

Robert Abrams, Atty. Gen. of the State of New York, New York City, for defendants; Robert S. Hammer, Asst. Atty. Gen., New York City, of counsel.

MEMORANDUM DECISION

GAGLIARDI, District Judge.

The isue presented by this case, which is before the court on remand from the Second Circuit, is whether three provisions of Section 350-j of the New York Social Service Law ("NYSSL") as amended May 1, 1977 by the New York Laws of 1977, Chapter 77, Section 10 ("the statute")[1] deny

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[1] The statute reads in relevant part, as follows:

§ 350-j. Emergency assistance to needy families with children.

(footnote continued on following page)

plaintiffs equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution.

(footnote continued from preceding page)

1. Any inconsistent provisions of this chapter or of any other law notwithstanding, so long as federal aid is available therefor, a social services district shall provide emergency assistance as herein defined to persons eligible, including migrant workers with families.

2. For purposes of this section, the term "emergency assistance" means aid, care and services authorized during a period not in excess of thirty days in any twelve month period to meet the emergency needs of a child or the household in which he is living, in the following circumstances:

(a) where the child is under twenty-one years of age; and

(b) the child is living with, or within the previous six months has lived with, one or more persons specified to subdivision b of section three hundred forty-nine of this chapter; and

(c) in cases of applications for grants of cash assistance, such child or such household is not categorically eligible for or receiving aid to dependent children; and

(d) such emergency needs resulted from a catastrophic occurrence or from a situation which threatens family stability and which has caused the destitution of the child and/or household; and

(e) such occurrence or situation could not have been foreseen by the applicant, was not under his control and, in the case of a person receiving public assistance, did not result from the loss, theft or mismanagement of a regular public assistance grant; and

(f) the emergency grant being applied for will not replace or duplicate a public assistance grant already made under section one hundred thirty-one-a of this chapter.

3. Emergency assistance to needy families with children shall be provided to the extent of items of need and services set forth in sections one hundred thirty-one-a of this chapter, and items of medical services set forth in section three hundred

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Defendants move for summary judgment pursuant to Fed.R.Civ.P. Rule 56. For the reasons which follow, defendants' motion is granted in part and denied in part.

I Background

Plaintiffs, recipients of public assistance in the form of Aid to Families with Dependent Children ("AFDC") commenced this class action in 1977 on behalf of themselves and other similarly situated AFDC recipients, challenging the validity of the revised eligibility requirements of the emergency assistance program established by the statute. In summary, the statute denies emergency aid 1) in the form of cash to AFDC recipients, 2) in all cases of loss, theft or mismanagement of a public assistance grant and 3) when sought to replace or duplicate a recurring public assistance grant. Defendant Philip Toia, Commissioner of the New York State Department of Social Services, is responsible for the administration of the state public assistance programs. Defendant Charles Bates, Commissioner of the Westchester County Department of Social Services, administers the state programs in that county as

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> sixty-five-a of this chapter, and in amounts set forth in the regulations of the department for children who are without available resources, and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home, and such destitution or such need did not arise because such children or relatives refused without good cause to accept employment or training for employment. Such emergency assistance, but not including cash grants, may be furnished to a family eligible for aid to dependent children only in the form of emergency services, and so long as federal aid remains available, for emergency fuel grants in the form of vendor restricted payments.

The challenged sections are 2(c); 2(e) and 2(f), fully discussed *infra*.

agent of the State Commissioner. The complaint alleges that the statute violates the supremacy clause of Article VI and the equal protection and due process clauses of the Fourteenth Amendment. In their supremacy clause challenge, plaintiffs argue that the state statute impermissibly establishes more restrictive eligibility standards than the provision of the Social Security Act defining the emergency aid program. *See* Section 406(e) of the Social Security Act, 42 U.S.C. § 606(e(1). Plaintiffs moved for class certification and summary judgment. This court, by decision dated September 29, 1977, certified the class of all potential recipients of emergency aid whose claims would be rejected based on the challenged statutory provisions, granted plaintiffs' motion for summary judgment on the supremacy clause claim and enjoined defendants from enforcing the challenged portions of the statute.[2] *Bacon* v. *Toia,* 437 F.Supp. 1371 (S.D.N.Y. 1977). The Second Circuit affirmed, 580 F.2d 1044 (2d Cir. 1978). Thereafter, on June 6, 1978, the Supreme Court decided in *Quern* v. *Mandley,* 436 U.S. 725, 98 S.Ct. 2068, 56 L.Ed.2d 658, that a state program which established more restrictive eligibility standards than the federal program was not necessarily invalid or ineligible for federal funding. The Second Circuit then granted defendants' motion for rehearing, recalled its order affirming the decision, vacated the judgment and remanded the case to this court for reconsideration of the supremacy clause issue in light of *Quern,* as well as for resolution of any remaining issues,

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[2] The court analyzed the constitutional issues for jurisdictional purposes only in light of the standards established by *Hagans* v. *Lavine,* 415 U.S. 528, 536-43, 94 S.Ct. 1372, 1378-1382, 39 L.Ed.2d 577 (1974), concluding that since the constitutional claims were not "completely devoid of merit," the court had jurisdiction under 28 U.S.C. § 1343(3). *Bacon* v. *Toia, supra,* 437 F.Supp. at 1380, *quoting Hagans* v. *Lavine,* 415 U.S. 528, 543, 94 S.Ct. 1372, 1382, 39 L.Ed.2d 577 (1974).

"if necessary." No. 77-7567 (2d Cir. Aug. 21, 19978). This court granted defendants' motions for reconsideration and for summary judgment on the supremacy clause issue, and requested the parties to brief the constitutional question raised by the New York statute. No. 77-2823 (S.D. N.Y. filed Feb. 1, 1979). The court's analysis of the equal protection claim[3] requires familiarity with the legislative history of the federal and state emergency aid programs, and with the facts giving rise to the instant action. Since the latter are set forth in detail in the court's decision granting plaintiffs relief on the statutory issue, *Bacon v. Toia, supra,* 437 F.Supp. 1371, they are summaried briefly herein.

II *Legislative History*

A. The Federal Statute

In 1968, Congress enacted an emergency assistance program ("EA") by amendment to the Social Security Act, Pub.L.No. 90—248, 42 U.S.C. §§ 603(a)(5), 606(e), as part of the AFDC program.[4] AFDC is one of the major co-

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[3] Plaintiffs allege, in conclusory terms, that the "irrational classifications" violate plaintiffs' rights to equal protection and due process. The court has focused on the equal protection claim which it deems the appropriarte analysis of a challenged classification created by a state welfare scheme. See *Weinberger* v. *Salfi,* 422 U.S. 749 at 770, 95 S.Ct. 2457, 2469, 45 L.Ed.2d 522. Plaintiffs may be asserting that the denial of a hearing or other opportunity to verify certain claims creates an "irrebuttable presumption" in denial of due process. However, the Supreme Court made clear in *Weinberger* v. *Salfi, supra,* that "irrebuttable presumption" analysis was ordinarily inapplicable to challenges directed at social welfare legislation. *Id.* at 771, 95 S.Ct. at 2469.

[4] The basic structure of the EA program is set forth in 42 U.S.C. § 606(e):

> (e)(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a

(footnote continued on following page)

operative federal-state categorical aid programs established by the Social Securities (sic) Act of 1935. A regulation promulgated under the EA statute provides that the federal government will reimburse 50% of the state's costs in administering an approved program. *See* 45 CFR § 233.-120(b)(2). Although EA was enacted as part of the AFDC program, it is apparent from the legislative history that Congress intended that the new plan would provide expanded coverage in terms of both the kinds of circumstances for which public assistance would be available and the categories of potential recipients. The emphasis was

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period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living,

(B) such services as may be specified by the Secretary: but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designated.

less on enabling states to provide a defined category of recipients with the means of daily subsistence than on encouraging states to respond rapidly in an appropriate manner to meet the immediate requirements of any needy family with dependent children in the event of a catastrophe. *See generally, Quern* v. *Mandley, supra.* The EA program, unlike AFDC which limits aid to families with an absent parent, provides that low income families with both parents present, including families who do not normally qualify for public assistance, are eligible for emergency assistance in the event of a catastrophe. In addition to broadening the group of potential recipients, EA also offers a different type of assistance. "Unlike the basic AFDC program . . . EA is not a comprehensive system of income maintenance, but rather a program designed to allow quick ad hoc responses to immediate needs." *Quern v. Mandley, supra,* 436 U.S. at 744, 98 S.Ct. at 2079. The emphasis on immediate response is clearly stated in the legislative history; "[i]ndeed one of the primary purposes of making EA available to persons not receiving or eligible for AFDC was to 'encourag[e] the States to move quickly in family crises, supplying the family promptly with appropriate services, in the hope that this would in many cases preclude the necessity for the family having to go on [AFDC] assistance on a more or less permanent basis.'" *Quern* v. *Mandley, supra,* 436 U.S. at 744, 98 S.Ct. at 2079, quoting 113 Cong.Rec. 23054 (1967) (remarks of Cong. Mills). As a mater of fact, if a state were to distribute its limited resources over a broad based needy population, as is appropriate in dispensing AFDC benefits, *see, Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1969), it would "fundamentally misconceiv[e] the purpose of the EA program." *Quern v. Mandley, supra,* 436 U.S. at 746, 98 S.Ct. at 2080.

"A family that is facing destitution because its home has been burned down is not helped at all by a 'moderate' grant insufficient to see it through the crisis." *Id.* In sum, EA "was designed 'to assure needed care for children, to focus maximum effort on self-support by families, and to provide *more flexible and appropriate tools to accomplish these objectives.*'" *Quern v. Mandley, supra,* 436 U.S. at 744, 98 S.Ct. at 2079, *quoting* S.Rep.No. 744, 90th Cong., 1st Sess. 165 (1967), U.S. Code Cong. & Admin.News 1967, p. 2834.

B. The State Program

In 1968, in order to take advantage of federal funding, New York enacted the predecessor to the present emergency aid statute, Section 350-J NYSSL, New York Laws of 1968, Chapter 992, Section 1.[5] In assessing the legislative intent

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[5] As originally enactde, the statute read in relevant part as follows:

> § 350-j. Emergency assistance to needy families with children
>
> 1. Any inconsistent provisions of this chapter or of any other law notwithstanding, so long as federal aid is available therefor, a social services district shall provide emergency assistance as herein defined to persons eligible, including migrant workers with families.
>
> 2. The term "emergency assistance" means aid, care and services furnished for a period not in excess of thirty days in any twelve month period, in the case of a needy child under the age of twenty-one who is living with a person related to him by blood, marriage or adoption who is eligible to receive aid to dependent children on his behalf pursuant to this chapter and regulations of the department.
>
> 3. Emergency assistance to needy families with children shall be provided in accordance with the regulations of the department for children who are without available resources,

(footnote continued on following page)

of the statute, the New York Court of Appeals concluded that it "comports with that expressed in the [federal legislative history]." *Baumes v. Lavine,* 38 N.Y.2d 296, 303, 379 N.Y.S.2d 760, 766, 342, N.E.2d 543, 547 (1975). The statute established basic criteria for eligibility, which were then modified by the regulations promulaged thereunder. Most relevant to this lawsuit is a 1969 regulation which stated, "emergency assistance shall not be provided when destitution is due to loss, theft or diversion of a grant already made." 18 NYCRR 372.2[c]. A class of potential emergency aid recipients instituted an Article 78 proceeding in the New York courts challenging the regulation on the grounds that it conflicted with NYSSL 350-j and with the federal statutory provisions, 42 U.S.C. § 606(e). The New York Court of Appeals affirmed a lower court decision which concluded that the provision was invalid. *Jones v. Berman,* 37 N.Y.2d 42, 371 N.Y.S.2d 422, 332 N.E.2d 303 (1975) Recognizing that the intent of the Commissioner may have been "to reduce or eliminate fraudulent claims that could easily be alleged and rarely disproven," 37 N.Y.2d at 52, 371 N.Y.S.2d at 428-29, 332 N.E.2d at 308,

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(footnote continued from preceding page)

and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home, and such destitution or such need did not arise because such children or relatives refused without good cause to accept employment or training for employment.

4. Such department regulations may make provisions for aid to be provided under this section in appropriate cases, when grants for aid to dependent children have been discontinued and fair hearings have been requested.

5. In scheduling fair hearings and investigations concerning applications for emergency assistance pursuant to this section, the department and local social services districts shall give priority to such applications and appeals.

the court nonetheless struck down the regulation on the ground that the agency was bound to "promulgate rules to further the implementation of the law as it exist[s]; . . . by adding a requirement not found in the existing State statute, the regulation as presently written is invalid." *Jones v. Berman, supra,* 37 N.Y.2d at 54, 371 N.Y.S.2d at 429, 332 N.E.2d at 308. Following this decision the legislature amended NYSSL 350-j to its present form.[6]

Although the legislative history of the amended version of the statute is sparse, available documents provide some insight into the legislative intent. A memorandum in support of the bill reads in relevant part:

> Concerning EAF [Emergency Aid to Families], a number of recent court decisions have interpreted the current EAF statute that any person who can demonstrate 'destitution,' regardless of the cause, can obtain an emergency grant. This proposal would establish in State Law those specific limitations which the State had previously attempted to adopt by regulation. It would clearly delineate those situations of legitimate need arising out of unforeseeable catastrophes for which emergency grants would be available.

A directive from the Department of Social Services to local agencies similarly indicates that the amended provision was intended to statutorily limit the grant of emergency assistance:

> EAF was designed to meet specific emergency needs of families with children and not to supplement public

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[6] See note 1, *supra.*

> assistance grants to ADC and HR[7] recipients. Recent court decisions . . . have expanded the availability of assistance under the EAF program. The court held that the availability of EAF assistance may be limited by statute; however, the Department had attempted to limit the scope of EAF Assistance through regulations without statutory authority. This new law limits the scope of EAF.

And finaly, an affidavit of John Hickey, Director, Income Support Unit, Division of Income Maintenance, New York State Department of Social Services, adds, in pertinent part:

> The intent of Section 350-j of the Social Services Law as enacted in 1968 was to take advantage of Federal funds to respond to emergency situations. The statute was not intended to serve as a supplement to the public assistance grant nor serve as an insurance policy in the event a public assistance grant was lost, stolen, or mimanaged. Accordingly, 18 NYCRR 372.2 was amended to prohibit the granting of emergency assistance when destitution was due to loss, theft or diversion of a grant already made. A copy of the amended regulation was duly submitted to the Department of Health, Education and Welfare for their approval and was duly approved on May 22, 1973.
>
> The New York State Court of Appeals thereafter, in the case of *Jones v. Berman,* 37 N.Y.2d 42 [371 N.Y.S.

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[7] The HR, or Home Relief program is "New York State's residual public assistance program. It is intended to provide a subsistence level of income to those of the state's needy who are ineligible to participate in the categorical welfare program such as . . . AFDC. Recipients of Home Relief are characteristically needy adults and children in two-parent families." *Rountree* v. *Berger,* 420 F.Supp. 282, 286-87 (E.D.N.Y. 1976) (three-judge court) Weinstein, J., dissenting). The HR program is entirely state funded. See 63A N.Y.Jur. § 229 at p. 543.

2d 422, 322 N.E.2d 303] (1975), held that this regulation was not authorized by Section 350-j of the Social Services Law.

The New York Legislature was concerned about the impact of the *Jones* decision since conceivably any family with children facing a risk of destitution would possibly be entitled to some assistance under that decision even though that family had previously received a grant of public assistance. The possible Legislative avenues of approach would be to repeal Section 350-j of the Social Services Law, or limit the amount of assistance that could be provided a particular family. Neither approach appeared attractive, thus, the Legislature amended Social Services Law 350-j to 'override' the *Jones* decision and to accomplish by statute what the Department had done by regulation.

The Legislature was particularly concerned that public assistance recipients would exploit the *Jones* decision to seek replacement of lost or stolen cash since it is impossible to verify a claim that cash has been lost or stolen. Replacement of public assistance grants in such circumstances would be costly and would discourage recipients from becoming self-reliant.[8]

The plaintiffs in the instant action each received a regular monthly assistance check, cashed it, and after having made some purchases, either lost the remaining cash or were victims of a theft. They each reported their losses to the police, and then applied to the local social services agency for an additional grant. Citing the statute,

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[8] This affidavit was submitted to the court in support of defendants' renewed motion for summary judgment following the remand from the Second Circuit.

the agency responed that the applicant did not qualify for emergency assistance because emergency grants could not be issued to replace public assistance monies which had been lost or stolen. Thereafter, plaintiffs instituted this action asserting, *inter alia*, that the challenged provisions create "arbitrary and irrational classifications in relation to the purposes of the Emergency Assistance Program, in violation of the Equal Protection and Due Process Clauses . . ."

III Discussion

In evaluating a statutory scheme for providing welfare benefits, this court is guided by the principles established in *Dandridge v. Williams, supra,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reason basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78, 31 S.Ct. 337, 240, 55 L.Ed. 369. 'The problems of government are practical ones and may justify, if they do not require, rought accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago,* 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland,* 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393.

Id. at 485, 90 S.Ct. at 1161.

The Court has reaffirmed these principles in *Weinberger v. Salfi,* 422 U.S. 749, 95 S.Ct. 24, 57, 45 L.Ed.2d 522 (1975)

and *Califano v. Aznavorian,* 439 U.S. 170, 99 S.Ct. 471, 58 L.Ed.2d 435 (1978). *See also Termini v. Califano,* 611 F.2d 367 (2d Cir. 1979); *Clayborne v. Califano,* 603 F.2d 372 (2d Cir. 1979). Although the enunciated standard gives the legislature considerable latitude in enacting laws to correct perceived social ills, "the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose." *Maher v. Roe,* 432 U.S. 464, 470, 97 S.Ct. 2376, 2381, 53 L.Ed.2d 484 (1977), *quoting San Antonio School Dist. v. Rodriguez,* 411 U.S. 1, 17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16 (1973).

Before measuring each challenged provision of Section 350-j against this standard, the court will consider the overriding concerns of the state legislature. First, because the statute provides no ceiling on the amount of aid an eligible family can receive, there is potential for unlimited demand on New York's limited welfare budget.[9] *Cf. Kozinski v. Schmidt,* 436 F.Supp. 201 (E.D.Wics.1977), discussed at n. 11, *infra,* (ceiling on aid of $150.00 per family). Although policy considerations support aid in any amount appropriate to meet the family's needs, the legislature was nevertheless aware of competing budgetary considerations. Second, administrative efficiency was an important goal. An emergency, by definition, requires an immediate response, and therefore the state is required to make a speedy determination on a claim without the benefit of the usual investigative techniques. Furthermore, investigating claims is a costly procedure, with administrative expenses depleting the program's budget and diminishing the amount of aid available to claimants. And finally,

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[9] Emergency aid may be provided "to the extent of items of need and services set forth in sections one hundred thirty-one-a." See NYSSL § 350-j(3).

the legislature was aware of the potential for abuse presented by the possibility of spurious clims. Each of these concerns: 1) that of competing demands on limited resources, 2) that of administrative convenience and 3) that of avoiding spurious claims has frequently been acknowledged as subjects of legitimate state interest. Budgetary considerations clearly supported a welfare classification in *Dandridge v. Williams, supra.* The Court held a state statute reasonable although it resulted in proportionately less aid being distributed to larger families. The court explicitly recognized that there were competing demands on Maryland's welfare budget in rejecting plaintiff's equal protection claim. *See also, Maher v. Roe, supra,* 432 U.S. at 479, 97 S.Ct. at 2385. While a statutory scheme cannot be supported merely on a showing of budgetary considerations if it results in invidious discrimination, the state's interest in preserving the integrity of its welfare budget is particularly persuasive in this case, where the state is providing additional assistance to welfare recipients whose basic needs have already been met in regular monthly public assistance grants under NYSSL § 131-a. See *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); *Hagans v. Berger,* 536 F.2d 525 (2d Cir. 1976); *Baumes v. Lavine,* 38 N.Y.2d 296, 379 N.Y.S.2d 760, 342 N.E.2d 543 (1975).

As to the second interest, administrative convenience, the Supreme Court has frequently recognied that "efficacious administration of governmental programs is not without some importance," *Frontiero v. Richardson,* 411 U.S. 677, 690, 93 S.Ct. 1764, 1772, 36 L.Ed.2d 583 (1973), although this rationale cannot support arbitrary and irrational classifications, nor survive strict judicial scrutiny. *Id.* However, in the instant case, there is a compelling need for efficiency since delay in investigating and process-

ing claims could result in the very destitution which the statute is aimed at avoiding.

The third state interest, that of avoiding spurious claims, is the one most vigorously advanced by the state in support of the challenged classifications. There can be no denying that a state has a legitimate interest in avoiding spurious claims for welfare benefits. See *Jimenez v. Weinberger*, 417 U.S. 628, 636, 94 S.Ct. 2496, 2501, 41 L.Ed.2d 363 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 637, 89 S.Ct. 1322, 1333, 22 L.Ed.2d 600 (1969). However, as the Court held in *Jimenez*, a classification must be "reasonably related to the prevention of spurious claims" in order to withstand even the minimal scrutiny afforded welfare statutes. *Id.*, 417 U.S. at 636, 94 S.Ct. at 2501. When "the potential for spurious claims is exactly the same as to both subclasses," *id.*, the statute is unreasonable.

In evaluating plaintiff's equal protection claim, the court must consider each of the challenged sections of the statute *in seriatim* to determine whether the classification will reasonably advance the legislative purposes of providing for the efficient and speedy distribution of emergency aid to needy families who file legitimate claims, while avoiding the payment of spurious claims.

§ 350-j(2)(c)—Denial of cash emergency assistance to applicants eligible for AFDC.

Section 350-j(2)(c) states that applications for cash assistance will be considered only if "such child or such household is not categorically eligible for or receiving aid to dependent children." The effect of this provision is to restrict AFDC recipients to emergency service grants while permitting other claimants to receive emergency grants in the form of either cash or services or both. The state

has offered no justification for this specific section in its brief, or in response to the court's inquiry. The court's independent research indicates that a conceivable justification for this provision may be found in a directive from the New York State Department of Social Services to local agencies eight days after the amended statute took effect. This directive explains that:

> ADC [AFDC] families will be ineligible for EAF in the form of cash grants since specific emergency *cash* needs can be met through the regular ADC program. EAF will be utilize to meet the same specific emergency needs for HR families with children. EAF *services* will be available to both ADC and HR families [as will] special fuel grants. [emphasis added]

Notwithstanding the directive's explanation that AFDC families do not qualify for cash emergency assistance because they are eligible for emergency cash benefits "through the regular ADC [AFDC] program," the state has been unable to offer, and this court has been unable to locate any support within New York's AFDC program for this explanation. Although the question of the state's evidentiary burden in seeking to uphold a statutory classification is one on which there is disagreement; see *Weinberger v. Salfi, supra,* 422 U.S. at 803, 95 S.Ct. at 2485 (Brenner [sic], J., dissenting); *Jimenez v. Weinberger, supra,* 417 U.S. at 640, 94 S.Ct. at 2503 (Rehnquist, J. dissenting), the court nevertheless declines to uphold a classification which clearly discriminates against AFDC recipients without any substantiation for the only justification discovered to support it. The court is unaware of any statute or regulation which provides cash emergency aid solely to AFDC recipients.

This court previously stated in analyzing this same section:

> Since the classipcation under attack limits its automatic denial of emergency assistance in the form of cash only to these applicants eligible for AFDC, this court need not determine whether the state could permissibly deny cash emergency assistance to *all* families applying for it.

Bacon v. Toia, supra, 437 F.Supp. at 1385. This court still need not decide this question, nor the question of whether the section would be constitutional if there *were* available alternative sources for emergency cash aid for AFDC recipients as the state contends. Although "any state of facts reasonably may be conceived to justify [the provision]", *McGowan v. Maryland, supra,* 366 U.S. at 426, 81 S.Ct. at 1105, 6 L.Ed.2d 393, this court declines to speculate as to what legitimate state purpose would be advanced. While the court recognizes the presumption that legislatures "have acted constitutionally, even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent," *McDonald* v. *Bd. of Elections,* 394 U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739 (1969), the court is also guided by the principle that "the state purpose upholding a statutory class [must be] legitimate and nonillusory." *McGinnis* v. *Royster,* 410 U.S. 263, 276, 93 S.Ct. 1055, 1063, 35 L.Ed.2d 282 (1973). The court hold that § 350-j(2)(c) is unconstitutional on the ground that it arbitrarily denies emergency aid in the form of cash to one category of potential beneficiaries of the statute without any demonstration that the resulting classification advances a legitimate, articulated state purpose.

§ 350-j(2)(e)—Denial of emergency assistance in all cases of loss, theft or mismanagement[10] of a public assistance grant.

Section 350-j(2)(e) provides that a family is eligible for emergency assistance in cases in which the emergency "could not have been foreseen by the applicant, was not under his control and, in the case of a person receiving public assistance, did not result from the loss, theft or mismanagement of a regular public assistance grant." Thus, this subsection denies emergency assistance to all welfare recipients who face destitution as a result of the loss or theft of the proceeds of a public assistance grant while it grants emergency assistance to welfare recipients whose needs arise from any other catastrophic occurrence. The statute also gives non-welfare recipients who are the victims of loss, or theft of cash an opportunity to document their losses. As the legislative history indicates, this subsection was enacted to override the *Jones* decision and to prevent duplicate payments to public welfare recipients who might feign the loss or theft of the proceeds of a grant. See *Hickey* Aff., *supra*. The court finds that the statute rationally carries out this legislative purpose.

First, it is reasonable to conclude that proving the theft or loss of cash is, if not impossible, nearly impossible. Furthermore, because the proof is elusive, the investigation of such claims is expensive and time consuming. While it is true, as plaintiffs assert, that the classification is both over-inclusive and under-inclusive in that it excludes even those with legitimate claims from submitting proof while permitting proof of potentially spurious

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[10] This court found in its prior decision that none of the plaintiffs resuested emergency aid as a result of mismanagement of their welfare checks, and therefore the court declined to review that provision. The court adheres to that position now.

claims, this argument is to no avail. As the Supreme Court stated in *Weinberger v. Salfi, supra,* 422 U.S. at 777, 95 S.Ct. at 2472:

> the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions, and would be directly contrary to our holding in *Mourning* [*v. Family Publications Service, Inc.,* 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973),] *supra.* Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylatic rule.

Plaintiffs also suggest that there are less drastic means for eliminating spurious claims, including verification upon individual determintion and recouping fraudulently obtained benefits from future welfare grants. Neither suggestion prevents a viable alternative to the present scheme for carrying out the legislative purpose of preventing spurious claims, because both assume that evidence supporting or corroborating the claim is available. As the state has observed, claims of lost or stolen cash

are almost always imposible to verify.[11] The state's choices may simply be to pay all such claims, or to pay

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[11] *Morgan* v. *Maher*, 449 F.Supp. 229 (D.Conn. 1978), cited by plaintiffs, is inapposite. Plaintiffs in that case challenged state procedures for replacing lost or stolen welfare checks, not the *proceeds* from the checks as in the instant case. It is easier to verify a claim of a lost or stolen check, as is apparent from the procedures instituted for that purpose by the state of Connecticut, *see id.* at p. 230, and therefore the court's observation that "[t]here is little indication that fraud is a frequent occurrence," is clearly irrelevant to the analysis of this case.

In *Burrell* v. *Norton*, 384 F.Supp. 339 (D.C. Conn. 1974), plaintiff challenged a state regulation which authorized emergency aid for replacement of furniture, clothing and other essential items to claimants whose loss occurred as a result of certain catastrophic events only; such as fire or flood. Plaintiff alleged that she was the victim of a theft while hospitalized and sought emergency assistance under the regualtion to replace stolen or vandalized household items. The court relying on the Supreme Court's reasoning in *Jimenez* v. *Weinberger, supra*, rejected the state's argument that the regulation served to limit fraudulent claims, concluding that the classification was both over and under inclusive and not rationally related to any legitimate state interest. While this court declines to speculate whether the Connecticut court would have reached a different result after *Weinberger* v. *Salfi, supra*, the district court would have had to consider the Supreme Court's analysis in that case along with *Jimenez*. Furthermore, this court does not agree with the Connecticut court to the extent that it rejected the state's argument that the regulation was rationally related to a legitimate interest in avoiding fraudulent claims. It would appear that the *fact* of a fire or flood is more easily verified, as is the physical evidence of the resulting destitution in many cases. A claim that an item is missing and has been stolen would certainly be difficult to prove.

A similar equal protection challenge was raised in the District Court of Wisconsin in *Kozinski* v. *Schmidt*, 436 F.Supp. 201 (E.D. Wisc. 1977). A state regulation authorized aid "in case of fire, flood or natural disaster." 436 F.Supp. at 202. The plaintiffs' situation did not fall within any of these categories and they were denied aid necessary to forestall eviction and disconnection of utilities. The Wisconsin court upheld the statute on the grounds that the state could select the priorities for the distribution of public aid. *Id.* at 204-05.

none. The legislature has chosen the latter alternative, and "the Constitution does not empower this court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge v. Williams, supra,* 397 U.S. at 487, 90 S.Ct. at 1163. Accordingly, the court holds that the state may automatically deny any claim for emergency aid when the impending destitution is alleged to have resulted from the loss or theft of the proceeds of a public assistance grant.

§ 350-j(2)(f)—Denial of emergency assistance to replace or duplicate a recurring public assistance grant.

This section denies emergency assistance when it is requested "to replace or duplicate a public assistance grant already made under Section one hundred thirty-one-a of the New York Social Services law." An analysis of this subsection thus requires determining the types of grants made under Section 131-a. This section, and the regulations promulgated thereunder, NYCRR Part 352, establish a state-wide standard of need and level of payment for all public assistance grants. The standard monthly need is determined by considering an individual's "regular recurring monthly needs", including those needs related to the costs of shelter and fuel, see § 352.1(a) and (b), as well as the costs of those items enumerated in § 352.1(c):

> . . . for any of such persons who may because of their case circumstances require any of the following items . . . furniture and furnishings for the establishment of a home, essential repair of heating equipment, cooking stoves and refrigerators, additional cost of meals for persons unable to prepare meals at home, replacement of clothing or furniture which has

been lost in a fire, flood or other like catastrophe, occupational training, cost of services and supplies already received, miscellaneous shelter costs, day care, homemaker services, housekeeping services, camp fees and payment of life insurance premiums.

In order to limit assistance under § 350-j to specific unforeseeable crisis situations, and to prevent recipients of public assistance from resorting to § 350-j as a source of supplemental income to augment a public assistance grant under § 131-a, subsection (f) prohibits awarding emergency aid in the same amount and calculated on the same standard of need as a grant already made under § 131-a. This hardly means, as plaintiffs argue, that subsection (f) effectively precludes welfare recipients from receiving any emergency assistance. Rather, if a welfare family's circumstances change due to an emergency, as defined in § 350-j, there is nothing in the latter statute to prevent the family from applying for an emergency grant. The clear language of the statute indicates that subsection (f) merely furthers the legitimate legislative purpose of protecting New York's welfare budget by prohibiting duplicate payments to a welfare recipient under two different statutory sections. The only distinction between welfare recipients and non-welfare recipients is that the former cannot receive both a monthly welfare check and an emergency aid grant to cover identical needs. Both groups, however, are eligible for emergency aid, for such items of need, in such amounts as provided for in Part 352." NYCRR § 372.4. § 350-j(2)(f) thus reasonably carries out the dual legislative intent of permitting emergency aid to self-sustaining families by reference to the same standard of need as welfare recipients, and preserving the welfare budget by avoiding duplicate payments.

IV Conclusion

The court enjoins the enforcement of NYSSL § 350-j-(2)(c) and grants defendants summary judgment as to that portion of the complaint challenging the remaining sections of the statute. The parties have not briefed the damage issue; however, it is clear that the named plaintiffs, on whose behalf monetary relief was sought, are not entitled to damages in light of the court's conclusion that subsection 2(e), on which the Welfare Department specifically relied in rejecting their claims, is valid. As to the remaining members of the class, to whom benefits will inure as a result of this decision enjoining enforcement of Section (2)(c), plaintiffs have not submitted any damage claims.

Let the parties submit judgment on ten days notice:

1) declaring NYSSL § 350-j(2)(c) unconstitutional and enjoining enforcement of that section;

2) granting defendants' summary judgment as to 350-j-(2)(e) and 35-j(2)(f).

So ordered.

Judgment and Order of the District Court, July 31, 1980.

Filed July 31, 1980
JUDGMENT AND ORDER
77 Civ. 2823 L.P.G.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEANNE BACON, individually and on behalf of her minor children ROBERT BACON, and IFE BACON, an on behalf of all other persons similarly situated,

Plaintiffs,

and

FREDDIE MAE GOODWINE, LINDA SELDERS and GERTRUDE PARRISH,

Plaintiffs-Intervenors,

against

PHILIP L. TOIA, individually and as Commissioner of the Department of Social Services of the State of New York, and CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Defendants.

Plaintiff Jeanne Bacon having commenced the above entitled action pursuant to 42 U.S.C. § 1983 on behalf of herself, her minor children and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure, and the defendants having submitted answers to the complaint, and plaintiff Bacon having moved by order

to show cause on June 13, 1977, for a preliminary injunction, and plaintiffs having moved for a class action order by notice of motion dated June 22, 1977, and Freddie Mae Goodwine, Linda Selders and Gertrude Parrish having intevened as parties plaintiffs, and plaintiffs having moved for summary judgment by notice of motion dated August 31, 1977, and this Court having rendered an opinion dated September 29, 1977, determining that plaintiffs motions for a class action order and for summary judgment should be granted, and this Court on October 21, 1977, having entered its order certifying the action as a proper class action and having entered its judgment in accordance with its opinion, and the United States Court of Appeals for the Second Circuit on May 11, 1978, having affirmed the judgment and order of the district court, and the Court of Appeals, on August 21, 1978, having granted defendants' motion for rehearing, and having vacated the judgment of the district court, and remanding the action to the District Court to consider the parties' contentions regarding *Quern* v. *Mandley*, 436 U.S. 725 (1978) "as well as the remaining issues in the case, if necessary", and defendant Toia, by notice of motion dated November 14, 1979, having moved for reconsideration of plaintiffs' motion for summary judgment, or, in the alternative, for summary judgment, and this Court on February 1, 1979, having rendered its memorandum opinion that New York Social Services Law, § 350-j(2)(c), (2)(e) and (2)(f) do not conflict with the federal Social Security Act, and this Court, on June 23, 1980, having rendered its memorandum decision finding that New York Social Services Law, § 350-j(2)(c) is unconstitutional and that New York Social Services Law § 350-j(2)(e) and (2)(f) are constitutional, it is hereby

Judgment and Order of the District Court, July 31, 1980.

ORDERED (1) that plaintiffs' claims for damages be and the same hereby are dismissed; and it is further

ORDERED (2) that defendant's motion for summary judgment be and hereby is granted to the extent that defendants are entitled to judgment with respect to the prayers for injuncive and declaratory relief in the complaint based on the alleged invalidity and unconstitutionality of New York Social Services Law, § 350-j(2)(e) and (2)(f), and is denied with respect to the prayers for injunctive and declaratory relief in the complaint based on the alleged invalidity and unconstitutionality of New York Social Services Law, § 350-j(2)(c); and it is further

ORDERED (3) that plaintiffs' motion for summary judgment be and the same hereby is granted to the extent that the complaint prays for injunctive and declaratory relief based on the alleged unconstitutionality of New York Social Services Law, § 350-j(2)(c), and is denied to the extent that the complaint prays for injunctive and declaratory relief based on the alleged invalidity and unconstitutionality of New York Social Services Law, § 350-j(2)(e) and (2)(f); and it is further

ORDERED, ADJUDGED and DECREED (4) that defendants be and hereby are granted judgment dismissing the action on the merits to the extent that the complaint seeks relief based upon the alleged invalidity and unconstitutionality of New York Social Services Law, § 350-j(2)(e) and (2)(f); and it is further

ADJUDGED and DECREED (5) that plaintiffs are entitled to and are hereby granted a declaratory judgment declaring that New York Social Services Law, § 350-j(2)(c) is in violation of the Equal Protection Clause of the Four-

teenth Amendment to the United States Constitution; and it is further

ORDERED, ADJUDGED and DECREED (6) that defendants, their officers, agents, employees, successors and all persons in active concert and participation with them be and hereby are permanently enjoined from enforcing New York Social Services Law, § 350-j(2)(c) an dfrom denying Emergency Assistance in the form of cash to an individual solely because the individual is eligible for or is receiving Aid to Families with Dependent Children assistance; and it is further

ORDERED (7) that the issues of attorneys' fees, costs and dsibursements be and hereby is reserved for later determination by this Court upon appropriate motion made within three (3) months after the completion of all appellate proceedings herein.

Dated: New York, New York
July 30, 1980

/s/ LEE P. GAGLIARDI
UNITED STATES DISTRICT JUDGE

Judgment Entered 7/31/80
RAYMOND BURGHARDT
Clerk

Notice of Appeal.

Docket Numbers
80-7725
80-7745

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BARBARA BLUM, as successor in office to PHILIP L. TOIA, sued individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

against

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated, FREDDI MAE GOODWINE, LINDA SELDERS and GERTRUDE PARISH; CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Appellees.

NOTICE IS HEREBY GIVEN that the above-named appellant hereby appeals to the Supreme Court of the United States from so much of the judgment of this Court entered May 4, 1981 as held New York Social Services Law § 350-j(2)(c)(e), (3) to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and enjoined its enforcement.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Filed October 5, 1981
U. S. Court of Appeals
For the Second Circuit

Notice of Appeal.

Appellee Bates did not participate in the appeal to the Court of Appeals and it is believed that he has no interest in the instant appeal.

Dated: New York, New York
October 2, 1981

Yours, etc.,

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Joint Appendix

—

Office - Supreme Court, U.S.
FILED
FEB 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-770

IN THE

Supreme Court of the United States

October Term, 1981

BARBARA BLUM, as successor in office to PHILIP L. TOIA, sued individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

against

JEANNE BACON, individually and on behalf of her minor children ROBERT BACON and IFE BACON, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Appeal Docketed October 20, 1981
Probable Jurisdiction Noted December 14, 1981

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Relevant Docket Entries

District Court

DATE	PROCEEDINGS
06-08-77	Filed complaint and issued summons.
06-08-77	Filed Pltff's affdvt & Order for special appt to serve process by Bruce MacInnis, Steven A. Hitov and Eileen R. Landau to make service of summons & complaint on all defts.
6-09-77	Case re-assigned to Gagliardi, J. m/n
6-13-77	Fld Summons and pltff's affdvt of personal service by Eileen R. Landau of the summons and complaint.
06-13-77	Filed Order to Show Cause re: preliminary injunction and application for a temporary restraining order with a temporary restraining ret: 6-20-77 room 444 at 10 AM. Gagliardi, J. m/n
6-23-77	Filed Deft's (P. L. Toia) Notice of Motion & Atty Affirmation for change of venue. Ret. June 29, 1977 at 10:00 A.M. in Room 444.
6-23-77	Filed Deft's (Toia) Memo of Law in support of his motion for transfer.
06-27-77	Filed Pltffs' notice of motion & affdvt for class action order ret. 7/5/77, 4:00 P.M.
06-27-77	Filed Pltffs' Memo or points and authorities in support of motion for class action order.
06-13-77	Pre-Trial Conference Held By Garliardi, J.
06-29-77	Pre-Trial Conference Held By "

Relevant Docket Entries

DATE	PROCEEDINGS
07-01-77	Filed Memo End. on document #6. Deft. Philip Toia moves pursuant to 28 USC, Sec. 1404(a) to transfer this case to ND, NY, where another case on the same issue has been filed. Court in its discretion denies deft's motion and refuses to change pltff's choice of forum. Case involves essentially questions of law and convenience of parties and potential witnesses does not require transfer. So Ordered. Gagliardi, J. m/n
07-11-77	Filed Pltff's affdvts and order to show cause to intervene for preliminary injunction and application for temporary restraining order ret. 4:00 P.M., Rm. 129, 7/12/77.
07-07-77	Filed Deft. Charles W. Bates Answer to complaint. DNB
07-18-77	Filed Affdvt of personal service by Lawrence S. Kahn of An Order To Show Cause with Temporary Restraining Order, Affdvts in support of motion of Freddie Mae Goodwine and Linda Selders to Intervene and for Preliminary Injunction & Proposed intervenor's complaint & pltffs' Memo of Points & Authorities in Support of motion to intervene, for Preliminary Injunction & Temporary Restraining Order upon Atty Gen of State of NY by a clerk on 7/11/77, 10:45 A.M.
07-20-77	Filed pltff.'s request for admission to deft. Philip Toia.

Relevant Docket Entries

DATE	PROCEEDINGS
08-02-77	Filed Stip & Order that Freddie Mae Goodwine and Linda Selders are permitted to intervene in action and they are brought in as party pltffs in the action; proposed intervenors' complaint as anned to motion by Freddie Mae Goodwine and Linda Selders to intervene in this action and for a preliminary injunction shall be deemed to be actual complaint of intervenors; further stipulated that further service of intervenors' complaint & service of a summons, is waived; hearing of application for preliminary injunction by intervenors shall be consolidated with a trial on merits of action; further stipulated that answers of defts served in response of complaint of Jeanne Bacon shall, insofar as applicable be deemed to be also answers to intervenors' complaint. Stewart, J.
08-02-77	Filed Stip & Order that defts are temporarily restrained from enforcing NY Social Services Law §350-j as amended, etc. Stewart, J.
08-02-77	Filed Stip & Order that Gertrude Parrish is permitted to intervene in action and is brought in as party pltff;, etc. further stipulated that further service of intervenor's complaint and service of a summons is waived; further stipulated that hearing of application for preliminary injunction by intervenor Parrish shall be consolidated with trial on merits of action; further stipulated that answers of defts in response to complaint of Jeanne Bacon shall, insofar as applicable to be deemed also the answers to complaint of intervenor Parrish. Stewart, J.

Relevant Docket Entries

DATE	PROCEEDINGS
09-06-77	Filed Pltff's affdvt & notice of motion for summary judgment ret. in Room 129, 9/20/77 4:00 P.M.
09-06-77	Filed Pltffs' Memorandum of Points and authorities in support of motion for summary judgment.
09-12-77	Filed Pltff's request for admissions.
09-20-77	Filed Memorandum of Law for deft. Toia in opposition to motion for summary judgment.
10-03-77	Filed Opinion #46411. This Court makes no determination concerning individual merits of any particular applicant for emergency assistance., etc. Accordingly, they are declared to be invalid and defts and successors in office shall be enjoined from enforcing them. Settle Order On Five Days' Notice. Gagliardi, J. m/n
10-20-77	Filed Judgment & Order. Ordered pltff's motion for class action is granted.; action is maintainable as class action; pltffs entitled and granted declaratory judgment as indicated. Ordered that defts, etc. are permanently enjoined. Ordered that issue of pltffs' entitlement to costs, disbursements & attys' fees are reserved for later determination by this Court upon appropriate motion. Gagliardi, J. Judgment Entered. Clk. 10/21/77 m/n Ent. 10/21/77
11-09-77	Filed State Defts. Notice of Appeal from final judgment entered 10/20/77. (mailed copy to Westchester Legal Services, Inc.; Legal Aid Society & David N. Brainin, Esqs on 11/10/77)

Relevant Docket Entries

DATE	PROCEEDINGS
11-18-77	Filed letter from Department of Law to J. Gagliardi dated, 10-17-77.
11-18-77	Filed letter from Westchester legal services, Inc. to J. Gagliardi dated, 9-26-77.
11-18-77	Filed letter from Department of Law to J. Gagliardi dated, *-22-77.
11-18-77	Filed letter from Westchester legal services, Inc. to J. Gagliardi dated, 8-8-77.
11-18-77	Filed letter from Department of Law to J. Gagliardi dated, 8-8-77.
11-18-77	Filed letter from Westchester legal services, Inc. to J. Gagliardi dated, 7-5-77.
11-18-77	Filed affdvt. of Evelyn K. Issac.
11-18-77	Filed answer of deft. Philip L. Toia.
11-25-77	Filed Notice that org. record has been certified and transmitted to USCA, 2nd Circuit.
05-31-78	Pre-Trial Conference Held By LPG.
09-08-78	Fld true copy of order from the USCA that the case is remanded to the district court to consider the contending arguments in the first instance, as well as the remaining issues in the case if necessary. m/n
11-06-78	Filed deft. Toia's notice of motion re: reconsideration of pltffs' motion for summary judgment, etc. ret: 11-14-78.
11-13-78	Filed deft. Bates' notice of motion re: summary judgment, etc. ret: 11-14-78.

Relevant Docket Entries

DATE	PROCEEDINGS
11-13-78	Filed deft. Bates' memo. of law in support of reconsideration of motion for summary judgment.
11-22-78	Filed pltffs.' memo. of points and authorities in opposition to defts.' motion for reconsideration ro summary judgment.
2- 1-79	Filed Memorandum Decision— . . . In summary, the defts.' motion for reconsideration of the court's previous decision is granted and defts.'s motion for summary judgment is granted as to the Supremacy Clause claim. Leval, [sic] J. m/n
02-09-79	Filed memo. of law for deft. Toia.
2-26-79	Filed pltffs.' memo of law.
6-25-80	Fld memorandum Opinion #50238 re: the Court enjoins the enforcement of NYSSL §350 and grants dfts summary jdgmt. Submit jdgmt on 10 days Notice Gagliardi J m/n
07/31/80	Judgment and Order—pltff's claims for damages are dismissed, deft's motion for S/J is granted as to injunctive and declaratory relief etc., etc. Gagliardi, J. Judgment Entered—7/31/80 Raymond F. Burghardt Clerk.
08-27-80	Filed notice of appeal to the USCA fr the final judgment and order of this Court entered on 7/31/80. Copy mailed to Robert Abrams and to Samuel Yasgur, White Plains, NY.
09-03-80	Filed notice of appeal to the USCA fr the final judgment entered in this action on 7/31/80. Copy mailed to Martin A. Schwartz and to Hon. Samuel S. Yasgur.

Relevant Docket Entries

DATE	PROCEEDINGS
09-08-80	Filed notice of appeal by deft Bates fr final judgment entered in this action on 7/31/80. Copy mailed to Robert Abrams and to Westchester Legal Svcs on 9/9/80.
09-17-80	Filed notice the original record on appeal has been certified and transmitted to the USCA this date.
10-15-80	Filed Stip & Order withdrawing the notice of appeal.
10/ 2/81	Filed Judgment & Order—Pltffs are entitled to and are hereby granted a declaratory judgment declaring that New York Social Services Law, §350-j(2)(e) is in violation of the Equal Protection Clause of the 14th Amendment of the US Constitution, etc., etc. Gagliardi, J. Judgment Entered—10/5/81 Raymond F. Burghardt Clerk
10-27-81	Filed Stip & order ext time for pltff to move for an award of atty fees to 45 days after completion of all appellate proceedings, etc. Gagliardi, J.
1/15/82	Filed Ex Parte Order—the Clerk of this Court is directed to transmit to the Clerk of the Supreme Court of US those original papers filed with him which should be part of the record on appeal. GAGLIARDI, J.
1/19/82	Filed notice the record on appeal has been certified and transmitted to the U.S. Supreme Court on 1/19/82.

Relevant Docket Entries

Court of Appeals

DATE	FILINGS—PROCEEDINGS
8-28-80	Copies of district court docket entries and notice of appeal filed on behalf of Bacon et al (80-7725)
	• • •
9-17-80	Record on appeal filed
9-23-80	Appellant Bacon et al motion for an order requesting US Dept of Health & Human Serv to file a brief amicus curiae filed, pfs (order endorsed 10-1-80 denying motion without prejudice to renew after the appeal is calendared, so that any renewed motion may be considered by the panel to which the appeal is assigned)
	• • •
10-14-80	Appellant Bacon brief filed, pfs
10-14-80	Appellant Bacon Joint-Appendix filed, pfs
	• • •
11-13-80	Appellee State Commissioner of Social Services brief, w/pfs filed.
11-13-80	Appellant Bacon reply brief, w/pfs filed.
11-16-80	Certified copy of order from district court withdrawing appeal of Bates filed. 80-7765
11-26-80	Appellant Westchester Legal Services motion for an order requesting U.S. Dept. of Health & Human Services to file a brief, amicus curiae, pfs filed (*order endorsed: 12-1-80 granted*)

Relevant Docket Entries

DATE	FILINGS—PROCEEDINGS
12- 8-80	Order withdrawing appeal of Bates individually and as Commissioner of the Westchester County Department of Social Services filed (EVG)
	• • •
12-18-80	Case argued before: Feinberg, CH.J., Kearse, CJJ, Edelstein, DJ
12-18-80	Order reconsidering motion for an extension of time for the Dept. of Health & Human Services to file amicus brief to and including January 31, 1981, the motion is granted to the extent that brief may be filed on or before January 15, 1981 filed.
1-15-81	Amicus Health and Human Services brief, w/pfs filed.
2- 4-81	Appellant Bacon et al supplemental brief w/pfs (pursuant to court request) filed.
2- 6-81	Appellee Toia letter filed. (pursuant to court request)
5- 4-81	Judgment affirmed in part and reversed in part, published opinion, Feinberg, Ch., CJ
5- 4-81	Judgment filed.
	• • •
5-18-81	Appellee Toia petition for rehearing with suggestion for rehearing in banc w/pfs filed.
	• • •
10- 5-81	Copy of notice of appeal to Supreme Court filed.

Verified Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Class Action 77 Civ. 2823

JEANNE BACON, individually and on behalf of her minor children ROBERT BACON and IFE BACON and on behalf of all other persons similarly situated,

Plaintiffs

against

PHILIP L. TOIA, individually and as Commissioner of the Department of Social Services of the State of New York, and CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Defendants.

I

PRELIMINARY STATEMENT

1. This is a class action authorized by 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202 for injunctive and declaratory relief and damages arising from defendants' enforcement of New York Social Services Law, §350-j, as amended, effective May 1, 1977 by the Laws of 1977, Chapter 77. Section 350-j, as amended, *inter alia* (1) denies Emergency Assistance in all cases of loss, theft or mismanagement of a regular public assistance grant; (2) denies Emergency

Assistance in the form of cash grants to all families eligible for Aid to Families with Dependent Children (AFDC) assistance; and (3) denies Emergency Assistance to replace or duplicate a recurring public assistance grant made pursuant to New York Social Services Law §131-a. (A copy of New York Social Services Law, §350-j, as amended is annexed hereto as Exhibit "A").

2. Plaintiffs contend that these restrictions on eligibility for Emergency Assistance contained in New York Social Services Law §350-j, as amended, violate the Social Security Act, 42 U.S.C. §601 *et seq.* and the regulations promulgated thereunder, the Supremacy Clause of Article VI of the United States Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

II

JURISDICTION

3. Jurisdiction over this action is conferred upon this Court by 28 U.S.C. §1343(3) as an action pursuant to 42 U.S.C. §1983 to redress the deprivation, under color of state law, of rights, privileges and immunities secured by the United States Constitution and the Federal Social Security Act.

III

PARTIES

4. Plaintiff Jeanne Bacon is suing on behalf of herself and her minor children, Robert Bacon and Ife Bacon and

on behalf of all other persons similarly situated. Plaintiff resides in Mamaroneck, New York with her minor son, Robert, age five, and her minor daughter, Ife, age three. Plaintiff is a citizen of the United States and the State of New York.

5. Defendant Philip L. Toia is sued individually and as Commissioner of the New York State Department of Social Services. He is responsible for the administration of New York's public assistance programs throughout the State of New York. He is responsible for the enforcement of New York Social Services Law §350-j, as amended. Defendant Toia has an office at 2 World Trade Center, New York, New York.

6. Defendant Charles W. Bates is the Commissioner of the Westchester County Department of Social Services. He is charged with administration, enforcement and operation of the public assistance programs in the County of Westchester, New York. He is subordinate to and acts as the agent of the Commissioner of the New York State Department of Social Services.

IV

CLASS ACTION ALLEGATIONS

7. Plaintiff is a member of a class of persons who are residents of the State of New York, who are relatives of and reside with a needy child under the age of 21, whose requests for Emergency Assistance have been or may be denied due to defendants' enforcement of New York Social

Services Law §350-j, as amended, to the extent that it denies Emergency Assistance (1) in all cases of loss, theft or mismanagement of the regular public assistance grant; (2) in the form of cash grants to all families eligible for A.F.D.C.; and (3) in all cases to replace or duplicate a recurring public assistance grant already made pursuant to New York Social Services Law, §131-a.

8. This is a proper class action pursuant to Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure because: (a) the class is so numerous that joinder of all members is impracticable. The contested Statute is applicable throughout the State of New York. There are literally thousands of persons in the plaintiff class, the exact or approximate number of whom is within the exclusive knowledge of defendants; (b) there are questions of law and fact common to the class, i.e., the validity of those portions of New York Social Services Law §350-j referred to *supra;* (c) the claims of the named plaintiff are typical of the claims of the class; (d) Westchester Legal Services, Inc., attorney for plaintiff, has sufficient legal resources and ability to fairly and adequately protect the interests of the class; and (e) the defendants, in enforcing the aforesaid Statute, have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

V

FACTUAL ALLEGATIONS

9. Plaintiff Jeanne Bacon's sole source of income consists of public assistance in the category of A.F.D.C. in the amount of $200 per month for herself and her children exclusive of rent. Her rent of $250 per month is paid by the Department of Social Services directly to plaintiff's landlord. She has no savings and no bank account. She owns no stocks, bonds, real property or valuable personal property of any kind.

10. On June 1, 1977, plaintiff received her monthly A.F.D.C. grant in the amount of $200 and proceeded to a local bank where she cashed the check, paid her Consolidated Edison and telephone bills totalling $50 and paid $76 for $130 worth of food stamps.

11. Plaintiff put the food stamp coupons and the remaining cash totalling $74 in her wallet.

12. From the bank, plaintiff walked to a grocery store in Mamaroneck. While shopping, plaintiff noticed that her wallet, which she had placed in her jacket pocket, was missing.

13. Plaintiff promptly reported the theft of her wallet to the Village of Mamaroneck Police Department.

14. Plaintiff also immediately notified Ms. Cohen, an employee of the White Plains office of the Westchester County Department of Social Services, of the theft and requested Emergency Assistance to replace the stolen cash

and food stamps. Plaintiff explained that she had no money to purchase food and other essential items for herself and her two minor children.

15. Ms. Cohen made arrangements with a local grocery store to supply $15 worth of food to plaintiff until a determination was reached on whether Emergency Assistance would be provided.

16. On June 3, 1977, plaintiff was informed by Ms. Taylor, a Supervisor at the White Plains office of the Westchester County Department of Social Services, that her request for Emergency Assistance was denied on the basis of a "new law" which precludes the furnishing of Emergency Assistance to replace lost or stolen cash. Ms. Taylor suggested that plaintiff contact the Salvation Army or Catholic Charities for assistance.

17. On June 6, 1977, plaintiff received the contents of her stolen wallet with the exception of the cash and food stamps in a plain envelope which arrived in the mail. (A copy of the envelope is annexed hereto as Exhibit "B".)

17-a. On June 7, 1977, plaintiff called Ms. Taylor of the Department of Social Services to request a written denial of her application for Emergency Assistance.

17-b. By letter dated June 8, 1977, plaintiff's request for Emergency Assistance was denied:

> "Because of the implementation of bill section 10 of Chapter 77 of the Laws of 1977, which amends 350-J of the Social Services Law, the District Offices have

> been prohibited from authorizing emergency grants to duplicate public assistance monies which have been lost, stolen or mismanaged."

(A copy of the letter dated June 8, 1977 is annexed hereto as Exhibit "C").

18. The sole basis for plaintiff's ineligibility for Emergency Assistance is New York Social Services Law, 350-j, as amended, which denies Emergency Assistance (1) in all cases of loss, theft or mismanagement of the regular public assistance grant; (2) in the form of cash grants to all families eligible for A.F.D.C.; and (3) in all cases to replace or duplicate a recurring public assistance grant already made pursuant to New York Social Services Law, §131-a.

19. The aforesaid requirements of New York Services Law, §350-j work an automatic denial of Emergency Assistance without regard to individual facts.

20. Were it not for the aforesaid requirements of New York Social Services Law, §350-j, plaintiff would have been eligible to receive Emergency Assistance.

21. Plaintiff meets all of the eligibility requirements for Emergency Assistance contained in the Federal Social Security Act, 42 U.S.C. §606(e), namely: (1) plaintiff has not received Emergency Assistance at any time within the past twelve (12) months; (2) plaintiff resides with a needy child under the age of 21; (3) said child is without available resources; (4) Emergency Assistance is necessary to

avoid destitution; and (5) such destitution did not arise because of a refusal to accept employment or training.

22. Plaintiff and her minor children have suffered and continue to suffer grave and irreparable harm due to defendants' denial of her request for Emergency Assistance. Since plaintiff is solely dependent on her public assistance grant, its theft has left her family with no money to meet their most basic living needs. Most importantly, plaintiff does not have and cannot buy food for herself and her two minor children. In addition, she cannot wash any clothes since she cannot pay the cost of a laundromat nor purchase soap powder. Finally, plaintiff has no money for transportation and therefore cannot take her children to their doctors and dentists appointments. Plaintiff herself suffers from a medical problem, but will be unable to keep her weekly doctor appointments since she cannot afford the bus fare. Plaintiffs have therefore suffered grave emotional and physical harm due to defendants' enforcement of New York Social Services Law, §350-j, as amended.

23. Defendants have acted in bad faith by enforcing those portions of New York Social Services Law, §350-j referred to *supra*. Defendants knew or should have known that said provisions violate the Social Security Act and the regulations promulgated thereunder as construed in cases such as *Lynch* v. *Philbrook*, 550 F. 2d 793 (2d Cir., 1977), *Williams* v. *Wohlgemuth*, 504 F.2d 163 (3rd Cir., 1976), and *Mandley* v. *Trainor*, 523 F.2d 415 (7th Cir., 1975).

V

LEGAL CLAIMS

24. New York Social Services Law, §350-j, as amended effective May 1, 1977 by the Laws of 1977, Chapter 77, denies Emergency Assistance in all cases of loss, theft or mismanagement of the regular public assistance grant, denies Emergency Assistance in the form of cash grants to all families eligible for Aid to Dependent Children Assistance and denies Emergency Assistance in all cases to replace or duplicate a recurring public assistance grant already made pursuant to New York Social Services Law, §131-a.

25. New York Social Services Law, §350-j, to the extent that it denies Emergency Assistance as described in paragraph 24, *supra*, on its face and as applied, arbitrarily, irrationally and conclusively establishes eligibility conditions for Emergency Assistance which have no rational relation to the purposes of the Emergency Assistance program in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

26. New York Social Services Law, §350-j, to the extent that it denies Emergency Assistance as described in paragraph 24, *supra*, on its face and as applied, conflicts with and violates the federal Social Security Act, 42 U.S.C. §601 *et seq.*, and in particular 42 U.S.C. §606(e) and the regulations promulgated thereunder by the United States

Department of Health, Education and Welfare, and the Supremacy Clause of Article VI of the United States Constitution.

VI

RELIEF REQUESTED

WHEREFORE, the planitiffs respectfully pray that this Court:

1. Assume jurisdiction of this case pursuant to 28 U.S.C. §1343(3).

2. Pursuant to 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure, enter a judgment declaring that New York Social Services Law, §350-j, as amended effective May 1, 1977 by the Laws of 1977, Chapter 77, to the extent that it denies Emergency Assistance as described in paragraph 24, *supra,* on its face and as applied, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Supremacy Clause of Article VI of the United States Constitution, and the Social Security Act, 42 U.S.C. §§601 *et seq.* and the regulations promulgated thereunder by the United States Department of Health, Education and Welfare.

3. Issue a preliminary and permanent injunction enjoining and restraining defendants, their servants, agents, employees and all other persons in active concert and par-

ticipation with them from enforcing New York Social Services Law, §350-j, as amended effective May 1, 1977 by the Laws of 1977, Chapter 77, to the extent that it denies Emergency Assistance in all cases of loss, theft or mismanagement of the regular public assistance grant, denies Emergency Assistance in the form of cash grants to all families eligible for A.F.D.C. and denies Emergency Assistance in all cases to replace or duplicate a recurring public assistance grant already made pursuant to New York Social Services Law, §131-a.

4. Enter a judgment in favor of plaintiff against defendants Toia and Bates, in their individual capacities, jointly and severally, pursuant to 42 U.S.C. §1983 and Rule 54 of the Federal Rules of Civil Procedure awarding plaintiff compensatory damages in the amount of two thousand five hundred dollars ($2,500) and punitive damages in the amount of two thousand five hundred dollars ($2,500).

5. Certify this action as a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

6. Grant plaintiffs their costs, disbursements and attorneys fees.

7. Grant plaintiffs such other and further relief as to this Court may seem just and equitable.

Respectfully submitted,

Dated: June 8, 1977
New Rochelle, N.Y.

/s/ Eileen R. Landau

Westchester Legal Services, Inc.
Eileen R. Landau, of Counsel
Martin A. Schwartz, of Counsel
Attorneys for Plaintiffs
95 Lincoln Avenue
New Rochelle, N. Y. 10801
Tel: (914) 235-090-

The Legal Aid Society,
Civil Division
John E. Kirklin, of Counsel
Constance P. Carden, of Counsel
11 Park Place
New York, New York 10007
Tel: (212) 227-2755

(Verified by Jeanne Bacon, June 8, 1977.)

Exhibit A Annexed to Verified Complaint

Laws of New York, Chapter 77, § 10*

* * *

§ 10. Subdivisions two and three of section three hundred fifty-j of such law, as amended by chapter one hundred ten of the laws of nineteen hundred seventy-one, are hereby amended to read, respectively, as follows:

2. ~~The~~ For purposes of this section, the term "emergency assistance" means aid, care and services ~~furnished for~~ authorized during a period not in excess of thirty days in any twelve month period, ~~in the case of a needy child under the age of twenty-one who is living with a person related to him by blood, marriage or adoption who is eligible to receive aid to dependent children on his behalf pursuant to this chapter and regulations of the department~~ to meet the emergency needs of a child or the household in which he is living, in the following circumstances:

(a) where the child is under twenty-one years of age; and

(b) the child is living with, or within the previous six months has lived with, one or more persons specified in subdivision b of section three hundred forty-nine of this chapter; and

(c) in cases of applications for grants of cash assistance, such child or such household is not categorically eligible for or receiving aid to dependent children; and

---

* Changes or additions in text are indicated by underline deletions by ~~strikeouts~~.

(d) such emergency needs resulted from a catastrophic occurrence or from a situation which threatens family stability and which has caused the destitution of the child and/or household; and

(e) such occurrence or situation could not have been foreseen by the applicant, was not under his control and, in the case of a person receiving public assistance, did not result from the loss, theft or mismanagement of a regular public assistance grant; and

(f) the emergency grant being applied for will not replace or duplicate a public assistance grant already made under section one hundred thirty-one-a of this chapter.

3. Emergency assistance to needy families with children shall be provided ~~in accordance with~~ to the extent of items of need and services set forth in sections one hundred thirty-one and one hundred thirty-one-a of this chapter, and items of medical services set forth in section three hundred sixty-five-a of this chapter, and in amounts set forth in the regulations of the department for children who are without available resources, and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home, and such destitution or such need did not arise because such children or relatives refused without good cause to accept employment or training for employment. Such emergency assistance, but not including cash grants, may be furnished to a family eligible for aid to dependent children only in the form of emergency services, and so long as federal aid remains available, for emergency fuel grants in the form of vendor restricted payments.

Exhibit B Annexed to Verified Complaint

Envelope

JEANNE BACON
729 OLD WHITE PL. RD
MAMK NY 10543

Exhibit "B"

Exhibit C Annexed to Verified Complaint

Letter Dated June 8, 1977

[LETTERHEAD OF]

WESTCHESTER COUNTY

DEPARTMENT OF SOCIAL SERVICES

Miss Jeanne Bacon
729 Old White Plains Road
Mamaroneck, New York

Dear Miss Bacon:

This letter is in response to your telephone request of 6/7/77 that we put in writing our refusal to authorize duplicate assistance to you because of the reported loss or theft of your money earlier this month.

Because of the implementation of bill section 10 of Chapter 77 of the Laws of 1977, which amends 350-J of the Social Services Law, the District Offices have been prohibited from authorizing emergency grants to duplicate public assistance monies which have been lost, stolen or mismanaged.

We regret that we are unable to help you.

Very truly yours,

/s/ G. TAYLOR

(Mrs.) G. Taylor
Supervising Examiner
Income Maintenance I

GT/bb

Answer — Defendant Toia

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2823 (L.P.G.)

JEANNE BACON, individually and on behalf of her minor children ROBERT BACON and IFE BACON and on behalf of all other persons similarly situated,

Plaintiffs,

against

PHILIP L. TOIA, individually and as Commissioner of the Department of Social Services of the State of New York, and CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Defendants.

Defendant Philip L. Toia, for his answer to the complaint herein, by his attorney, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, respectfully alleges:

1. Denies each and every allegation contained in paragraphs "1", "2", "3", so much of paragraph "5" as may be construed to allege that he is presently the Commissioner of the New York State Department of Social Services; "7", "8", "25" and "26" thereof.

2. Denies knowledge of information sufficient to form a belief as to each and every allegation contained in paragraphs "9" through "17-a" thereof; "18" and "20" through "23" thereof.

As and for a First Separate and Complete Defense:

3. The complaint fails to raise a substantial claim within the jurisdiction of the court.

Answer—Defendant Toia

As and for a Second, Separate and Complete Defense:

4. The complaint fails to state a claim upon which relief may be granted.

As and for a Third, Separate and Complete Defense:

5. New York Laws of 1977, ch. 77 is consistent with the Federal Constitution and Social Security Act and regulations.

As and for a Fourth, Separate Defense:

6. The acts of the defendant complained of herein were performed in the course of his official duties, without malice and pursuant to law.

WHEREFORE, it is respectfully requested that the complaint be dismissed; or in the alternative, that declaratory judgment be granted in favor of the defendant.

Dated: New York, New York
July 12, 1977

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendant Toia

By /s/ ROBERT S. HAMMER

ROBERT S. HAMMER
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3396

Verified Answer — Defendant Bates

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Class Action 77 Civ. 2823

JEANNE BACON, individually and on behalf of her minor children ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated,

Plaintiffs,

against

PHILIP L. TOIA, individually and as Commissioner of the Department of Social Services of the State of New York, and CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Defendants.

Defendant CHARLES W. BATES, Commissioner of the Department of Social Services, Westchester County, by his attorney David N. Brainin, County Attorney of the County of Westchester, answering the complaint herein alleges:

1. Denies each and every allegation contained in paragraph "1" of the complaint.

2. Denies each and every allegation contained in paragraph "2" of the complaint.

3. Denies each and every allegation contained in paragraph "3" of the complaint.

Verified Answer—Defendant Bates

4. Denies each and every allegation contained in paragraph "4" of the complaint.

5. Admits the allegations contained in paragraph "6" of the complaint and affirmatively alleges that Defendant Bates acted pursuant to the Laws of the State of New York in enforcing Social Services Law Section 350-j as amended by Chapter 77 of the Laws of 1977.

6. Denies each and every allegation contained in paragraph "7" of the complaint.

7. Denies each and every allegation contained in paragraph "8" of the complaint.

8. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraphs "9", "10", "11", "12" and "13" of the complaint.

9. Denies the allegations contained in paragraph "14" of the complaint, except admits that the plaintiff notified Ms. Cohen, an employee of the White Plains District Office of the Westchester County Department of Social Services, of the alleged theft and that a request was made by plaintiff for Emergency Assistance.

10. Denies the allegations contained in paragraph "15" of the complaint and affirmatively alleges that Ms. Madeline Carter, acting on behalf of the Commissioner of Social Services of Westchester County, made arrangements to have the Community Action Program of Mamaroneck provide $15.00 worth of food to plaintiff.

Verified Answer—Defendant Bates

11. Admits each and every allegation contained in paragraph "16" of the complaint and affirmatively alleges that Defendant Bates' determination to deny plaintiff's application for Emergency Assistance was made pursuant to the Laws of the State of New York.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "17" of the complaint.

13. Admits each and every allegation contained in paragraphs "17-a" and "17-b" of the complaint.

14. Admits the allegations contained in paragraph "18" of the complaint and affirmatively alleges that subsequent to this Court granting plaintiff's application to restrain and enjoin Defendant Bates from enforcing New York Social Services Law §350-j as amended by c. 77 Laws of 1977, Defendant Bates reviewed plaintiff's eligibility for Emergency Assistance under the guidelines of former Social Services Law §350-j. As a result of this review, Defendant Bates determined plaintiff was eligible for and plaintiff did receive a grant of emergency assistance.

15. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph "22" of the complaint.

16. Denies each and every allegation contained in paragraph "23" of the complaint and affirmatively alleges that Defendant Bates, contrary to acting in bad faith, acted

pursuant to the Laws of the State of New York in enforcing New York Social Services Law §350-j as amended by Chapter 77 of the Laws of 1977.

17. Denies each and every allegation contained in paragraphs "25" and "26" of the complaint.

As and for a First Separate and Complete Defense, Defendant Bates Alleges:

18. Defendant Bates as Commissioner of Social Services of Westchester County is a public official charged with responsibility to obey and uphold the laws of the State of New York.

19. Section 10 of Chapter 77, Laws of 1977, amended §350-j of the Social Services Law State of New York and became effective May 1, 1977.

20. Defendant Bates as Commissioner of Social Services of Westchester County, administers a joint County and State program of public assistance and care and is required to follow and enforce the rules, regulations and administrative directives of the Commissioner of the New York State Department of Social Services.

21. By Administrative Letter dated May 9, 1977, Deputy Commissioner Blanche Bernstein acting on behalf of the State Commissioner of Social Services directed Defendant Bates to implement Section 10 of Chapter 77, Laws of 1977, in relation to Emergency Assistance to Families. (A copy of 77 Adm. 28 is annexed hereto as Exhibit "A".)

Verified Answer—Defendant Bates

22. Plaintiff is a recipient of Aid to Families With Dependent Children. Under the aegis of said Law and said Directive of the State Commissioner of Social Services, Defendant Bates is precluded from granting Emergency Assistance in the form of cash payments to a recipient of Aid to Families With Dependent Children (Social Services Law §350-j 2(c) as amended).

23. On or about June 1, 1977, one month after the effective date of amended Social Services Law §350-j, plaintiff received her recurring public assistance grant.

24. Pursuant to the existing laws of the State of New York, Defendant Bates is statutorily precluded from replacing or duplicating a recurring public assistance grant already made under Social Services Law §131a. (Social Services Law §350-j 2(f) as amended.)

25. Subsequent to making some expenditures, plaintiff alleges a theft of her wallet containing the remaining cash portion of her recurring public assistance grant.

26. Pursuant to the Laws of the State of New York and Directive of the State Commissioner of Social Services, Defendant Bates is precluded from granting Emergency Assistance to persons receiving public assistance where the emergency results from loss, theft or mismanagement of a public assistance grant. (Social Services Law §350-j 2(e) as amended.)

27. The complaint, with respect to Defendant Bates as Commissioner of Social Services of Westchester County, fails to state a claim upon which relief may be granted.

Verified Answer—Defendant Bates

As and for a Second Separate and Complete Defense, Defendant Bates Alleges:

28.. The allegations contained in paragraphs 1 through 27 of the Answer are repeated and re-alleged as though fully set forth at length herein.

29. The complaint, with respect to Defendant Bates as an individual, fails to state a claim upon which relief may be granted.

WHEREFORE, Defendant CHARLES W. BATES, individually and as Commissioner of Social Services of the County of Westchester, prays for a judgment dismissing the complaint, and such other and further relief as to the Court may seem proper, together with the costs and disbursements of this action.

DAVID N. BRAININ
County Attorney
Attorney for Defendant
CHARLES W. BATES
600 County Office Building
148 Martine Avenue
White Plains, New York 10601
Tel: 914 682-2585

/s/ CHERYL J. BRADLEY

By: Cheryl J. Bradley
Of Counsel

(Verified by Charles W. Bates, July 6, 1977.)

Exhibit A Annexed to Answer — Defendant Bates

Administrative Directive, 77 Adm. 28

[LETTERHEAD OF]

NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES
10 North Pearl Street
Albany, New York 12243

PHILIP L. TOIA
Commissioner

ADMINISTRATIVE DIRECTIVE

[An Administrative Directive is a written communication to local Social Services Districts providing directions to be followed in the administration of public assistance and care programs.]

Transmittal No: 77 ADM-28
[Income Maintenance]

Date: May 9, 1977

TO: Commissioners of Social Services

SUBJECT: Chapter 77 of the Laws of 1977
Emergency Assistance to Families

SUGGESTED DISTRIBUTION: All Public Assistance Staff

CONTACT PERSON: Any questions concerning this release should be directed to John W. Hickey, Income Support Unit, by calling (800) 342-3715 extension 4-9224.

I. *Purpose*

The purpose of this release is to advise local social services districts that bill section 10 of Chapter 77 of

the Laws of 1977 has amended the Social Services Law in relation to the Emergency Assistance to Families Program. This chapter law, which amends Section 350-j, clearly limits the scope of EAF to avoid its expansion as a broad system of supplementary grants for persons receiving ADC and specifically prohibits emergency grants to duplicate regular public assistance grants which have been lost, stolen or mismanaged.

These provisions are effective May 1, 1977.

II. *Background*

EAF was designed to meet specific emergency needs of families with children and not to supplement public assistance grants to ADC and HR recipients. Recent court decisions (primarily the cases of *Domine and Gibson et al v. Lavine* and *Jones et al v. Lavine*) have expanded the availability of assistance under the EAF program. The courts held that the availability of EAF assistance may be limited by statute; however, the Department had attempted to limit the scope of EAF assistance through regulations without statutory authority. This new law now limits the scope of EAF.

III. *Program Implications*

ADC families will be ineligible for EAF in the form of cash grants since specific emergency cash needs can be met through the regular ADC program. EAF will be utilized to meet the same specific emergency

needs for HR families with children. EAF services will be available to both ADC and HR families and special fuel grants will be available if and for so long as Federal participation continues in the use of EAF to meet winter fuel for heating needs.

IV. *Required Action*

Implementation of this chapter law necessitates the following program requirements:

— EAF may be furnished to a family eligible for ADC only in the form of emergency services, and for winter fuel for heating needs if and for so long as federal funds are available for such purposes.

— EAF should be furnished to HR families with children to meet an emergency need resulting from a crisis situation threatening the family, or to meet urgent needs resulting from a sudden occurrence or set of circumstances demanding immediate attention.

— EAF may *not* be provided to replace or duplicate a public assistance grant already made to an ADC or HR family.

V. *Additional Information*

We are aware of a recent case in the U.S. Court of Appeals, second circuit (*Lynch v. Philbrook*) dealing with emergency assistance. Our preliminary analysis

of this case indicates that it does not bar implementation of this statute. We will continue to follow this case and keep you advised of any future developments.

/s/ BLANCHE BERNSTEIN

Blanche Bernstein
Deputy Commissioner
Division of Income Maintenance

FILING REFERENCES

Previous ADMs/INFs—74 ADM-40, 74 ADM-150, 75 ADM-55, 75 ADM 57, 75 ADM-86.

Dept. Regs.—Part 372.

Social Services Law and Other Legal References—SSL § 350-j, Chapter 77 of Laws of 1977.

Bulletin/Chapter Reference—Bulletin 185.

Affidavit of Jeanne Bacon, June 8, 1977, in Support of Motion for Preliminary Injunction

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2823 (L.P.G.)

JEANNE BACON, Individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated,

Plaintiffs,

against

PHILIP L. TOIA, Individually and as Commissioner of the Department of Social Services of the State of New York, and CHARLES W. BATES, Individually and as Commissioner of the Westchester County Department of Social Services,

Defendants.

State of New York)
County of Westchester) ss.:

JEANNE BACON, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action and I make this affidavit in support of my application for a temporary restraining order and my motion for a preliminary injunction. I have personal knowledge of all of the facts set forth herein.

Affidavit of Jeanne Bacon

2. I am suing on behalf of myself and my minor son, Robert, age 5, and minor daughter, Ife, age 3. We reside in Mamaroneck, New York.

3. My family's sole source of income consists of public assistance in the category of Aid to Families with Dependent Children (A.F.D.C.) in the amount of $200 per month for myself and my children exclusive of rent, which is paid directly by the Department of Social Services to my landlord. I have no savings or bank account. I own no stocks, bonds, real property or valuable personal property of any kind.

4. On June 1, 1977, I received my monthly A.F.D.C. grant in the amount of $200 and proceeded to a local bank where I cashed the check, paid my Consolidated Edison and telephone bills totalling $50 and paid $76 for $130 worth of food stamps.

5. I put the food stamp coupons and the remaining cash totalling $74 in my wallet.

6. From the bank, I walked to a grocery store in Mamaroneck. While shopping, I noticed that my wallet, which I had placed in my jacket pocket, was missing.

7. I promply reported the theft of my wallet to the Village of Mamaroneck Police Department.

8. I also immediately notified Ms. Cohen, an employee of the White Plains office of the Westchester County Department of Social Services of the theft and requested

Emergency Assistance to replace the stolen cash and food stamps. I explained to Ms. Cohen that I had no money to purchase food and other essential items for myself and my two minor children.

9. Ms. Cohen made arrangements with a local grocery store to supply me with $15 worth of food until a determination was reached on whether Emergency Assistance would be provided.

10. On June 3, 1977, I was informed by Ms. Taylor, a Supervisor at the White Plains office of the Westchester County Department of Social Services, that my request for Emergency Assistance was denied on the basis of a "new law" which precludes the furnishing of Emergency Assistance to replace lost or stolen cash. Ms. Taylor suggested that I contact the Salvation Army or Catholic Charities for assistance.

11. On June 6, 1977, I received the contents of my stolen wallet with the exception of the cash and food stamps in a plain envelope which arrived in the mail. (A copy of the envelope is annexed hereto as Exhibit "A").

12. On June 7, 1977 I telephoned Ms. Taylor at the Department of Social Services and requested a written denial of my application for Emergency Assistance.

13. By letter dated June 8, 1977, my request for Emergency Assistance was denied:

> "Because of the implementation of bill section 10 of Chapter 77 of the laws of 1977, which amends 350-j

of the Social Services Law, the District Offices have been prohibited from authorizing emergency grants to duplicate public assistance monies which have been lost, stolen or mismanaged."

(A copy of the letter dated June 8, 1977 is annexed hereto as Exhibit "B").

14. The sole basis for my ineligibiity for Emergency Assistance is New York Social Services Law, §350-j, as amended, which denies Emergency Assistance (1) in all cases of loss, theft or mismanagement of the regular public assistance grant; (2) in the form of cash grants to all families eligible for A.F.D.C.; and (3) in all cases to replace or duplicate a recurring public assistance grant made pursuant to New York Social Services Law, §131-a.

15. Were it not for the aforesaid requirements of New York Social Services Law §350-j I would have been eligible to receive Emergency Assistance.

16. I meet all of the eligibility requirements for Emergency Assistance contained in the Federal Social Security Act, 42 U.S.C. §606(e), namely (1) I have not received Emergency Assistance at any time within the past twelve months; (2) I reside with a needy child under the age of 21; (3) Said child is without available resources; (4) Emergency Assistance is necessary to avoid destitution; and (5) Such destitution did not arise because of a refusal to accept employment or training.

17. My minor children and I have suffered and continue to suffer grave and irreparable harm due to defendants'

denial of my request for Emergency Assistance. Since my family is solely dependent on my public assistance grant, the theft has left my family with no money to meet our most basic living needs. Most importantly, I do not have, and cannot buy, food for myself and my two young children. In addition, I cannot wash any clothes since I cannot pay the cost of a laundromat nor purchase soap powder. Finally, I have no money for transportation and therefore cannot take my children to their doctors and dentists appointments. I suffer from a medical problem that necessitates my seeing a physician once a week, yet I will be unable to keep these weekly appointments since I cannot afford the bus fare.

18. No previous application for the relief sought has been made to this or to any other Court.

19. I am proceeding by Order To Show Cause because of the irreparable damage to my family that defendants' denial of my request for Emergency Assistance has caused and will continue to cause.

Wherefore, deponent respectfully prays that this Court grant my application for a temporary restraining order and my motion for a preliminininary injunction, and for such other relief as to this Court appears just and proper.

/s/ Jeanne Bacon

Jeanne Bacon

(Jurat omitted in printing.)

Exhibit A Annexed to Affidavit of Jeanne Bacon

Envelope

(Printed herein at page 24a.)

Exhibit B Annexed to Affidavit of Jeanne Bacon

Letter Dated June 8, 1977

(Printed herein at page 25a.)

Affidavit of Freddie Mae Goodwine, July 7, 1977, in Support of Motion for Preliminary Injunction

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2823 (L.P.G.)

JEANNE BACON, Individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated,

Plaintiffs,

against

PHILIP L. TOIA, Individually and as Commissioner of the New York State Department of Social Services, and CHARLES W. BATES, Individually and as Commissioner of the Westchester County Department of Social Services,

Defendants.

State of New York)
County of Westchester) ss.:

FREDDIE MAE GOODWINE, being duly sworn, deposes and says:

1. I am a proposed plaintiff-intervenor in the above-entitled action and I make this affidavit in support of my application to intervene as a plaintiff in the above-entitled action and in support of my application for a temporary restraining order and my motion for a preliminary injunction. I have personal knowledge of all facts set forth herein.

Affidavit of Freddie Mae Goodwine

2. I am suing on behalf of myself and my minor daughter Tanya, age 6, and minor son Gary, age 10. We reside in Yonkers, New York.

3. My family's sole source of income consists of public assistance in the category of Aid to Families with Dependent Children (A.F.D.C.) in the amount of $445.00 per month for myself and my children, $200.00 of which is that portion of our grant for non-shelter needs such as food, clothing, and other incidental items. I have no savings or bank account. I own no stocks, bonds, real property or valuable personal property of any kind.

4. On or about July 1, 1977, I received my monthly A.F.D.C. grant in the amount of $445.00 and went to a local bank where I cashed the check and purchased a money order in the amount of $245.00 to be used for rent.

5. I put the money order in my purse and the remaining $200.00 cash in an envelope which I also put in my purse.

6. From the bank I went to the G. & G. Shop in Yonkers. I tried on some clothing in a dressing room in the store. I did not purchase the clothing I tried on and left my purse in a dressing room while I returned the items of clothing to a rack; the purse was out of my view for a period of approximately two minutes.

7. When I returned home in the early evening I noticed that the envelope was not in my purse.

8. On Monday, July 5, 1977 I notified Ms. S. Feldsher, a Senior Examiner in the Yonkers District Office of the Westchester County Department of Social Services of the

loss and requested Emergency Assistance to replace the lost cash. I explained that I had no money to purchase food and other essential items for myself and two children.

9. On the advice of counsel, I also reported the loss of the cash to the Yonkers Police Department on July 5, 1977.

10. By letter dated July 5, 1977 my request for Emergency Assistance was denied on the grounds that:

> "No Duplication of PA Grants for *lost, stolen* or mismanaged funds.
>
> Section 10 Chapter 77 of Social Service laws of 1977. Ammending Section 131 of Social Service laws.
>
> EAF can be used for fuel or natural catastrophy."

A copy of the letter dated July 5, 1977 is annexed hereto as Exhibit "A".

11. The sole basis for my ineligibility for Emergency Assistance is New York Social Services Law, Section 350-J, as amended, which denies Emergency Assistance (1) in all cases of loss, theft or mismanagement of the regular public assistance grant; (2) in the form of cash grants to all families eligible for A.F.D.C.; and (3) in all cases to replace or duplicate a recurring public assistance grant made pursuant to New York Social Services Law, Section 131-a.

12. Were it not for the aforesaid requirements of New York Social Services Law, Section 350-J, I would have been eligible to receive Emergency Assistance.

13. I meet all of the eligibility requirements for Emergency Assistance contained in the Federal Social Security Act, 42 U.S.C. Section 606(e), namely (1) I have not re-

ceived Emergency Assistance at any time within the last twelve months; (2) I reside with a needy child under the age of 21; (3) Said child is without available resources; (4) Emergency Assistance is necessary to avoid destitution; and (5) Such destitution did not arise because of a refusal to accept employment or training.

14. My minor children and I have suffered and continue to suffer grave and irreparable harm due to defendants' denial of my request for Emergency Assistance. Since my family is solely dependent on my public assistance grant, the loss of cash has left my family with no money to meet our basic living needs. Most importantly I cannot buy food for myself and two young children. In addition I cannot wash any clothes since I cannot pay for the use of a laundromat nor purchase soap powder.

15. No previous application for the relief sought has been made to this or to any other Court.

16. I am proceeding by Order To Show Cause because of the irreparable damage to my family that defendants' denial of my request for Emergency Assistance has caused and will continue to cause.

Wherefore, deponent respectfully prays that this Court grant my application to intervene, and for a temporary restraining order and my motion for a preliminary injunction, and for such other relief as to this Court appears just and proper.

/s/ Freddie Mae Goodwine

Freddie Mae Goodwine

(Jurat omitted in printing.)

Exhibit A Annexed to Goodwine Affidavit

Letter Dated July 5, 1977

[LETTERHEAD OF]

WESTCHESTER COUNTY

DEPARTMENT OF SOCIAL SERVICES

No Duplication of PA Grants for *lost, stolen* or mismanaged funds.

Section 10 Chapter 77 of Social Service [sic] laws of 1977 ammending [sic] Section 131 of Social Service [sic] laws.

EAF can be used for fuel or natural catastrophy,

Sincerely

/s/ S. FELDSHER
Sr. Examiner
963-7450
X 213

Affidavit of Linda Selders, July 8, 1977, in Support of Motion for Preliminary Injunction

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

State of New York)
County of Westchester) ss.:

LINDA SELDERS, being duly sworn, deposes and says:

1. I am a proposed plaintiff intervenor in the above-entitled action and I make this affidavit in support of my motion to intervene, my application for a temporary restraining order and my motion for a preliminary injunction. I have personal knowledge of all of the facts set forth herein.

2. I am suing on behalf of myself and my minor son, MeQuan P. Selders, age four. We reside in Mount Vernon, New York. We are citizens of the United States and New York State.

3. The sole source of my family's income is a monthly public assistance grant I receive on behalf of myself and my minor son in the A.F.D.C. category in the amount of $362.00, $212.00 of which is intended to be applied towards my monthly rent of $225.00. I have no savings and no bank account. I own no stocks, bonds, real property or valuable property of any kind.

Affidavit of Linda Selders

4. On July 1, 1977, I received my monthly A.F.D.C. grant of $362.00, and a food stamp voucher authorizing me to buy food stamps, and went to a check-cashing service where I cashed the public assistance check. I put the money and the food stamp voucher in an envelope which I placed into my pocketbook.

5. During the evening of July 1, 1977, I paid my monthly rent to my landlord. Subsequently, I spent $38.22 in order to buy clothing for my son.

6. On July 4, 1977, another tenant of the private house in which I reside, and I, hosted a party at the house. Approximately seventy-five people were present at the party, including many persons whom I did not know personally. In an attempt to safeguard the balance of my public assistance grant, which was by then $82.00, and my food stamp voucher, in advance of the party I placed my pocketbook on the top of the lower bed of a high-rise bed.

7. Following the party, on the morning of July 5, 1977, I took my pocketbook from the high-rise bed and saw that the $82.00 and the food stamp voucher was missing.

8. I thereupon reported the theft of my money to the Police Department of the City of Mount Vernon.

9. On the afternoon of July 5, 1977, I informed my caseworker, Mr. N. Capriola, an Examiner employed by the Westchester County Department of Social Services, of the theft of the balance of my public assistance grant and

of my food stamp voucher, and requested that the Department of Social Services issue to me a grant of emergency assistance to replace the stolen funds.

10. Mr. Capriola denied my request for emergency assistance informing me that a "new law" provides that emergency assistance is not to be given to public assistance recipients whose need for such aid arises from the loss or theft of the proceeds of a public assistance grant. Mr. Capriola informed me that he will issue to me a new food stamp voucher, with which I could buy food stamps. I will be unable to use the voucher, however, since I have no funds and therefore cannot convert the voucher into food stamps.

11. On July 6, 1977 I received from Mr. Capriola a written denial of my application for emergency assistance. The notice, dated July 6, 1977, stated:

> "Linda Selders has been denied EAF assistance to replace lost cash.
>
> Denial per-instructions of Administrative letter number 77."

A copy of this notice is annexed hereto as Exhibit "A".

12. The sole basis for my ineligibility for Emergency Assistance is New York Social Services Law, §350-j, as amended, which denies Emergency Assistance (1) in all cases of loss, theft or mismanagement of the regular public assistance grant; (2) in the form of cash grants to all families eligible for A.F.D.C.; and (3) in all cases to

replace or duplicate a recurring public assistance grant made pursuant to New York Social Services Law, §131-a.

13. The aforesaid requirements of New York Social Services Law §350-k [sic] work an automatic denial of Emergency Assistance without regard to individual facts.

14. Were it not for the aforesaid requirements of New York Social Services Law §350-j, I would have been eligible to receive Emergency Assistance.

15. I meet all of the eligibility requirements for Emergency Assistance contained in the Federal Social Security Act, 42 U.S.C. §606(e), namely (1) I have not received Emergency Assistance at any time within the least [sic] twelve months; (2) I reside with a needy child under the age of 21; (3) my child is without available resources; (4) assistance is necessary to avoid destitution; and (5) such destitution did not arise because of a refusal to accept employment or training.

16. My minor child and I have suffered and continue to suffer grave and irreparable harm due to defendants' denial of my request for Emergency Assistance. Since I am solely dependent on my public assistance grant, the loss of cash has left my family with no money to meet our basic living needs. Most importantly, I cannot buy food for myself and my minor child. In addition, I cannot wash any clothes since I cannot pay for the use of a laundromat nor purchase soap powder.

17. No previous application for the relief sought has been made to this or to any other Court.

18. I am proceeding by order to show cause because of the irreparable damage to my family that defendant's denial of my request for Emergency Assistance has caused and will continue to cause.

WHEREFORE, deponent respectfully prays that this Court grant my motion to intervene, my application for a temporary restraining order and my motion for a preliminary injunction, and for such relief as to this Court appears just and proper.

/s/ LINDA SELDERS

LINDA SELDERS

(Jurat omitted in printing.)

Exhibit A Annexed to Affidavit of Linda Selders

Notice Dated July 6, 1977

Case 185406

To whom it may concern:

Linda Selders has been denied EAF assistance to replace lost cash.

Denial per instructions of Administrative Letter number 77.

/s/ N. Capriola

Proposed Intervenors' Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

I.

PRELIMINARY STATEMENT

1. This is a class action authorized by 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202 for injunctive and declaratory relief and damages arising from defendants' enforcement of New York Social Services Law, §350-j, as amended, effective May 1, 1977 by the Laws of 1977, Chapter 77. Section 350-j, as amended, *inter alia,* (1) denies Emergency Assistance in all cases of loss, theft or mismanagement of a regular public assistance grant; (2) denies Emergency Assistance in the form of cash grants to all families eligible for Aid to Families with Dependent Children (AFDC) assistance; and (3) denies Emergency Assistance to replace or duplicate a recurring public assistance grant made pursuant to New York Social Services Law §131-a.

2. Plaintiffs contend that these restrictions on eligibility for Emergency Assistance contained in New York Social Services Law §350-j, as amended, violate the Social Security Act, 42 U.S.C. §601, *et seq.* and the regulations promulgated thereunder, the Supremacy Clause of Article VI of the United States Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

II.

JURISDICTION

3. Jurisdiction over this action is conferred upon this Court by 28 U.S.C. §1343(3), which provides for the original jurisdiction of this Court in suits brought to redress the deprivation, under color of state law, of rights, privileges and immunities secured by the United States Constitution and the Federal Social Security Act. Plaintiffs' requests for injunctive relief and damages are authorized by 42 U.S.C. §1983. Plaintiffs requests for a declaratory judgment is authorized by 28 U.S.C. §§2201 and 2202.

III.

PARTIES

Plaintiff Freddie Mae Goodwine

4. Plaintiff Freddie Mae Goodwine is suing on behalf of herself and her minor children, Tanya Goodwine and Gary Goodwine, and on behalf of all other persons similarly situated. Plaintiff resides in Yonkers, New York, with her minor daughter, Tanya, age six, and her minor son, Gary, age ten. Plaintiff is a citizen of the United States and the State of New York.

Plaintiff Linda Selders

5. Plaintiff Linda Selders is suing on behalf of herself and her minor son, MeQuan P. Selders, and on behalf of all other persons similarly situated. Plaintiff resides in

Mount Vernon, New York, with her son, McQuan [illegible], age 4. Plaintiff is a citizen of the United States and the State of New York.

Defendant Philip L. Toia

6. Defendant Philip L. Toia is sued individually and as Commissioner of the New York State Department of Social Services. He is responsible for the administration of New York's public assistance programs throughout the State of New York. He is responsible for the enforcement of New York Social Services Law §350-j, as amended. Defendant Toia has an office at Two World Trade Center, New York, New York.

Defendant Charles W. Bates

7. Defendant Charles W. Bates is the Commissioner of the Westchester County Department of Social Services. He is charged with the administration, enforcement and operation of the public assistance programs in the County of Westchester, New York. He is subordinate to and acts as the agent of the Commissioner of the New York State Department of Social Services.

IV.

CLASS ACTION ALLEGATIONS

8. Plaintiffs are members of a class of persons who are residents of the State of New York, who are relatives of and reside with a needy child under the age of 21, whose requests for Emergency Assistance have been or may be

denied due to defendants' enforcement of New York Social Services Law §350-j, as amended, to the extent that it denies Emergency Assistance (1) in all cases of loss, theft or mismanagement of the regular public assistance grant; (2) in the form of cash grants to all families eligible for A.F.D.C.; and (3) in all cases to replace or duplicate a recurring public assistance grant already made pursuant to New York Social Services Law, §131-a.

9. This is a proper class action pursuant to Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure because: (a) the class is so numerous that joinder of all members is impracticable. The contested Statute is applicable throughout the State of New York. There are literally thousands of persons in the plaintiff class, the exact or approximate number of whom is within the exclusive knowledge of defendants; (b) there are questions of law and fact common to the class, i.e., the validity of those portions of New York Social Services Law §350-j referred to *supra;* (c) the claims of the named plaintiff are typical of the claims of the class; (d) Westchester Legal Services, Inc., attorney for plaintiffs, has sufficient legal resources and ability to fairly and adequately protect the interests of the class; and (e) the defendants, in enforcing the aforesaid Statute, have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

V.

FACTUAL ALLEGATIONS

A. *Plaintiff Freddie Mae Goodwine*

10. Plaintiff Freddie Mae Goodwine's sole source of income consists of public assistance in the category of A.F.D.C. in the amount of $445.00 per month, $200.00 of which is that portion of the grant which is used for non-shelter needs of food, clothing and other incidental items. She has no savings and no bank account. She owns no stocks, bonds, real property or valuable personal property of any kind.

11. On or about July 1, 1977, plaintiff received her monthly A.F.D.C. grant in the amount of $445.00 and went to a local bank where she cashed the check and purchased a money order in the amount of $245.00 to be used for rent.

12. Plaintiff put the money order in her purse and put the remaining $200.00 cash in an envelope which she also put in her purse.

13. Plaintiff left the bank and went to the G & G Shop in Yonkers and tried on some clothing in a dressing room in that store. Plaintiff did not purchase the clothing she tried on and left her purse in a dressing room while she returned the items of clothing to a rack. Plaintiff's purse was out of her view for a period of approximately two minutes.

14. Plaintiff returned to her home in the early evening of July 1, 1977 and noticed that the envelope in which she had placed the $200.00 in cash was not in her purse.

15. Plaintiff reported the loss of the cash to the Yonkers Police Department on July 5, 1977.

16. On Tuesday, July 5, 1977, plaintiff notified Ms. S. Feldsher, a Senior Examiner in the Yonkers District Office of the Westchester County Department of Social Services, of the loss and requested emergency assistance to replace the lost cash. Plaintiff explained that she had no money to purchase food and other essential items for herself and her children.

17. By letter date July 5, 1977, plaintiff's request for emergency assistance was denied on the grounds that:

> "No duplication of PA grants for *lost, stolen* or mismanaged funds.
>
> Section 10, Chapter 77 of Social Services Laws.
>
> EAF can be used for fuel or natural catastrophy."

A copy of the letter dated July 5, 1977 is annexed hereto and made a part hereof as Exhibit "A".*

18. The sole basis for plaintiff's ineligibility for Emergency Assistance is New York Social Services Law §350-j, as amended, which denies emergency assistance (1) in all cases of loss, theft or mismanagement of the regular public assistance grant; (2) in the form of cash grants to all families eligible for A.F.D.C.; and (3) in all cases to replace or duplicate a recurring public assistance grant made pursuant to New York Social Services Law §131-a.

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* Reproduced as Exhibit A to affidavit of Freddie Mae Goodwine, *ante* at p. 48a.

19. The aforesaid requirements of New York Social Services Law §350-j work an automatic denial of Emergency Assistance without regard to individual facts.

20. Were it not for the aforesaid requirements of New York Social Services Law §350-j, plaintiff would have been eligible to receive Emergency Assistance.

21. Plaintiff meets all of the eligibility requirements for Emergency Assistance contained in the Federal Social Security Act, 42 U.S.C. §606(e), namely (1) plaintiff has not received Emergency Assistance at any time within the last twelve months; (2) plaintiff resides with a needy child under the age of 21; (3) said child is without available resources; (4) assistance is necessary to avoid such destitution; and (5) such destitution did not arise because of a refusal to accept employment or training.

22. Plaintiff and her minor children have suffered and continue to suffer grave and irreparable harm due to defendants' denial of her request for Emergency Assistance. Since plaintiff is solely dependent on her public assistance grant, the loss of cash has left her family with no money to meet their basic living needs. Most importantly, plaintiff cannot buy food for herself and her two minor children. In addition, she cannot wash any clothes since she cannot pay for the use of a laundromat nor purchase soap powder.

23. Defendants have acted in bad faith by enforcing those portions of New York Social Services Law §350-j, referred to *supra*. Defendants knew or should have known

that said provisions violate the Social Security Act and the regulations promulgated thereunder as construed in cases such as *Lynch* v. *Philbrook,* 550 F. 2d 793 (2d Cir., 1977), *Williams* v. *Wohlgemuth,* 540 F. 2d 163 (3rd Cir., 1976), and *Mandley* v. *Trainor,* 523 F. 2d 415 (7th Cir. 1975).

B. *Plaintiff Linda Selders*

24. The sole source of income of plaintiff Linda Selders' family is a monthly public assistance grant she receives on behalf of herself and her minor son in the A.F.D.C. category in the amount of $362.00, $212.00 of which is intended to be applied towards her monthly rent of $225.00. She has no savings and no bank account. She owns no stocks, bonds, real property or valuable property of any kind.

25. On July 1, 1977, plaintiff received her monthly A.F.D.C. grant of $362.00, and a food stamp voucher authorizing her to purchase food stamps, and went to a check-cashing service where she cashed the public assistance check. She put the money and the food stamp voucher in an envelope which she placed into her pocketbook.

26. During the evening of July 1, 1977, plaintiff paid her monthly rent to her landlord. Subsequently, she spent $38.22 in order to buy clothing for her son.

27. On July 4, 1977, plaintiff and another tenant in the private house in which they both reside hosted a party at the house. Approximately seventy-five people were present at the party, including many persons whom plaintiff did

not know personally. In an attempt to safeguard the balance of her public assistance grant, which was by then $82.00, and her food stamp voucher, plaintiff, in advance of the party, placed her pocketbook on top of the lower bed of a high-rise bed.

28. Following the party, on the morning of July 5, 1977, plaintiff took her pocketbook from the high-rise bed and saw that the $82.00 and the food stamp voucher was missing.

29. Plaintiff thereupon reported the theft of her money to the Police Department of the City of Mount Vernon.

30. On the afternoon of July 5, 1977, plaintiff informed her caseworker, Mr. N. Capriola, an Examiner employed by the Westchester County Department of Social Services, of the theft of the balance of her public assistance grant and of her food stamp voucher, and requested that the Department of Social Services issue to her a grant of emergency assistance to replace the stolen funds.

31. Mr. Capriola denied plaintiff's request for emergency assistance informing her that a "new law" provides that emergency assistance is not to be given to public assistance recipients whose need for such aid arises from the loss or theft of the proceeds of a public assistance grant. Mr. Capriola informed plaintiff that he will issue to her a new food stamp voucher, with which she could buy food stamps. Plaintiff will be unable to use the voucher, however, since she has no funds and therefore cannot convert the voucher into food stamps.

32. On July 6, 1977, plaintiff received from Mr. Capriola a written denial of her application for emergency assistance. The notice, dated July 6, 1977, stated:

> "Linda Selders has been denied EAF assistance to replace lost cash.
>
> Denial per-instructions of Administrative letter number 77."

A copy of the notice is annexed hereto as Exhibit "B".*

33. The sole basis for plaintiff's ineligibility for Emergency Assistance is New York Social Services Law, §350-j, as amended, which denies emergency assistance (1) in all cases of loss, theft or mismanagement of the regular public assistance grant; (2) in the form of cash grants to all families eligible for A.F.D.C.; and (3) in all cases to replace or duplicate a recurring public assistance grant made pursuant to New York Social Services Law, §131-a.

34. The aforesaid requirements of New York Social Services Law §350-j work an automatic denial of Emergency Assistance without regard to individual facts.

35. Were it not for the aforesaid requirements of New York Social Services Law §350-j, plaintiff would have been eligible to receive Emergency Assistance.

36. Plaintiff meets all of the eligibility requirements for Emergency Assistance contained in the Federal Social Security Act, 42 U.S.C. §606(e), namely (1) plaintiff has

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* Reproduced as Exhibit to affidavit of Linda Selders, *ante* at p. 54a.

not received Emergency Assistance at any time within the last twelve months; (2) plaintiff resides with a needy child under the age of 21; (3) said child is without available resources; (4) assistance is necessary to avoid destitution; and (5) such destitution did not arise because of a refusal to accept employment or training.

37. Plaintiff and her minor child have suffered and continue to suffer grave and irreparable harm due to defendants' denial of her request for Emergency Assistance. Since plaintiff is solely dependent on her public assistance grant, the loss of cash has left her family with no money to meet their basic living needs. Most importantly, plaintiff canot buy food for herself and her minor child. In addition, she cannot wash any clothes since she cannot pay for the use of a laundromat nor purchase soap powder.

38. Defendants have acted in bad faith by enforcing those portions of New York Social Services Law, §350-j, referred to *supra*. Defendants knew or should have known that said provisions violate the Social Security Act and the regulations promulgated thereunder as construed in cases such as *Lynch* v. *Philbrook*, 550 F. 2d 793 (2d Cir. 1977), *Williams* v. *Wohlgemuth*, 540 F. 2d 163 (3rd Cir. 1976), and *Mandley* v. *Trainor*, 523 F. 2d 415 (7th Cir. 1975).

VI.

LEGAL CLAIMS

39. New York Social Services Law, §350-j, as amended effective May 1, 1977 by the Laws of 1977, Chapter 77, denies Emergency Assistance in all cases of loss, theft or

mismanagement of the regular public assistance grant, denies Emergency Assistance in the form of cash grants to all families eligible for Aid to Dependent Children assistance and denies Emergency Assistance in all cases to replace or duplicate a recurring public assistance grant already made pursuant to New York Social Services Law, §131-a.

40. New York Social Services Law, §350-j, to the extent that it denies Emergency Assistance as described in paragraph 39 on its face and as applied, arbitrarily, irrationally and conclusively establishes eligibility conditions for Emergency Assistance which have no rational relation to the purposes of the Emergency Assistance program in violation of the Due Processs and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

41. New York Social Services Law, §350-j, to the extent that it denies Emergency Assistance as described in paragraph 39, *supra,* on its face and as applied, conflicts with and violates the federal Social Security Act, 42 U.S.C. §601, *et seq.,* and in particular 42 U.S.C. §606(e), and the regulations promulgated thereunder by the United States Department of Health, Education and Welfare, and the Supremacy Clause of Article VI of the United States Constitution.

VIII.

RELIEF REQUESTED

WHEREFORE, the plaintiffs respectfully pray that this Court:

1. Assume jurisdiction of this case pursuant to 28 U.S.C. §1343(3).

2. Pursuant to 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure, enter a judgment declaring that New York Social Services Law, §350-j, as amended effective May 1, 1977 by the Laws of 1977, Chapter 77, to the extent that it denies Emergency Assistance as described in paragraph 39, *supra,* on its face and as applied, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Supremacy Clause of Article VI of the United States Constitution, and the Social Security Act, 42 U.S.C. §§601, *et seq.,* and the regulations promulgated thereunder by the United States Department of Health, Education and Welfare.

3. Issue a preliminary and permanent injunction enjoining and restraining defendants, their servants, agents, employees and all other persons in active concert and participation with them from enforcing New York Social Services Law, §350-j, as amended effective May 1, 1977, by the Laws of 1977, Chapter 77, to the extent that it denies Emergency Assistance in all cases of loss, theft or mismanagement of the regular public assistance grant, denies Emergency Assistance in the form of cash grants to all families elegible for A.F.D.C. and denies Emergency Assistance in

all cases to replace or duplicate a recurring public assistance grant already made pursuant to New York Social Services Law, §131-a.

4. Enter a judgment in favor of plaintiffs against defendants Toia and Bates, in their individual capacities, jointly and severally, pursuant to 42 U.S.C. §1983 and Rule 54 of the Federal Rules of Civil Procedure, awarding plaintiffs conpensatory damages in the amount of two thounsand five hundred dollars ($2,500) each and punitive damages in the amount of two thousand five hundred dollars ($2,500) each.

5. Certify this action as a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

6. Grant plaintiffs their costs, disbursements and attorneys fees.

7. Grant plaintiffs such other and further relief as to this Court may seem just and equitable.

Dated: July 8, 1977
New Rochelle, New York.

Respectfully submitted,

WESTCHESTER LEGAL SERVICES, INC.
EILEEN LANDAU, Of Counsel
MARTIN A. SCHWARTZ, Of Counsel
LAWRENCE S. KAHN, Of Counsel
MARTIN DIENNOR, Of Counsel
Office & P.O. Address
95 Lincoln Avenue
New Rochelle, New York 10801
Tel: (914) 235-0906

Attorneys for Plaintiffs

Request for Admissions, July 15, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

Plaintiff, JEANNE BACON, requests defendant, PHILIP TOIA, within thirty (30) days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objection to admissibility which may be interposed at trial.

1. Annexed to this Notice as Exhibit "A" is a true copy of a letter written by William Toby, Regional Commissioner to defendant Philip Toia, which letter states, *inter alia* that:

> Regarding the EAF provision, the situation remains unchanged. It is impacted on by *Mandley* v. *Trainor*, 545 F.2d 1062 (7th Cir. 1976).

2. Annexed to this Notice as Exhibit "B" is a true copy of a letter written by Florence Aitchison, Associate Regional Commissioner for Assistance Payments to Dr. Blanche Bernstein, Deputy Commissioner for Income Maintenance in New York State which letter states, *inter alia*, that:

> We have questions about the limitations placed on emergency assistance as noted in Section 10 of the legislation. Specifically we believe there may be legal

problems in eliminating the availability of emergency cash assistance to AFDC families as provided for in subdivisions two and three of Section 350j of the New York Law. We also believe there may be difficulty with your preclusion of EAF in the event of lost, stolen or mismanaged funds as noted in item (e) of subdivision 2 of the above-cited section.

3. Annexed hereto as Exhibit "C" is a true copy of a Department of Social Services Administrative Directive, Transmittal No. 77-ADM-28, dated May 9, 1977, which specifically prohibits grants of Emergency Assistance to duplicate regular public assistance grants which have been lost, stolen or mismanaged.

Dated: July 15, 1977
New Rochelle, New York

/s/ Eileen R. Landau

Westchester Legal Services, Inc.
Eileen R. Landau, of Counsel
Martin A. Schwartz, of Counsel
95 Lincoln Avenue
New Rochelle, New York 10801
Tel: (914) 235-0906

Exhibit A Annexed to Request for Admissions

Letter Dated May 24, 1977

May 24, 1977

Mr. Philip Toia
Commissioner
New York State Dept. of Social Services
40 North Pearl Street
Albany, New York 12243

Dear Commissioner Toia:

I am writing with regard to your recently enacted legislation. On May 6, 1977 Florence Aitchison, the Associate Regional Commissioner for Assistance Payments wrote to Blanche Bernstein outlining the difficulties we foresaw with your implemenation of these sections of the statute dealing with AFDC. A copy of that letter is attached.

Our Regional Attorney's office has concurred in our reservations about the applicable sections and made the following additional points.

Regarding the shelter increase policy, in addition to setting up a double standard and denying rights to a fair hearing, the limits appear to have been arbitrarily set without regard to use of any applicable methodology. However, even if such an attempt had been made the first two objections noted would preclude its legal application in the State's AFDC program.

Regarding the illegal alien policy, it is worth noting that the use of the phrase "immediately referred" is somewhat ambiguous. It is permissible for staff to advise the in-

dividual to visit INS or the Consulate. However, it would not be permissible for staff to phone or otherwise release any information regarding the AFDC applicant to INS or any other agency or person.

Section 4 offers incentives to social services districts, in the form of a greater state contribution to the Home Relief program, for having an AFDC ineligibility rate of 5% or less. It should be noted that Federal matching would not be available for such incentive payments.

The child support collection goal could create a problem for the AFDC program if it in any way hindered local agencies from providing AFDC benefits in accordance with the statewide plan.

Regarding the EAF provision, the situation remains unchanged. It is impacted on by *Mandley v. Trainor*, 545 F.2d 1062 (7th Cir. 1976). It is to be noted that under the simplified plan procedures your plan amendment must be submitted no later than the end of the quarter in which the plan change is implemented. Since you have already issued Administrative Letter 77 ADM-28 regarding this provision, your plan amendment is due in our office no later than June 30, 1977. Your State Plan Unit and Income Maintenance Division have already been informally notified of this requirement.

Therefore, I would appreciate it if you would advise our staff of the following:

1) what action you plan to take regarding the shelter increase policy;

Exhibit A Annexed to Request for Admissions

2) confirmation that the phrase "immediately referred", in relation to persons unable to prove alien status, means that the individual will be advised to visit INS or his consulate and not that staff will call or otherwise release confidential information to INS or the consulate;

3) whether the EAF plan amendment to the Title IV-A simplified plan will be in by June 30, 1977.

If you or your staff wish to discuss these matters further or meet with our staff regarding them, please phone Marlene Vidibor on 212-264-2892.

Sincerely,

William Toby
Regional Commissioner

enc.

cc: Regional Atty's Office
Sherry Petty

Exhibit B Annexed to Request for Admissions

Letter Dated May 6, 1977

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

May 6, 1977

Dr. Blanche Bernstein
Deputy Commissioner
for Income Maintenance
New York State Dept.
of Social Services
40 North Pearl
Albany, New York 12243

Dear Dr. Bernstein:

We have recently received and are, with the assistance of our lawyers in the process of thoroughly reviewing your recently enacted State legislation which affects AFDC. These are three areas of particular concern to us which we believe may contravene Federal statute and regulation.

First is the policy of shelter increase maximum. This policy in effect, sets up two maximums: one for recipients and a second for applicants. The Code of Federal Regulation Title 45 Section 233.20 requires a statewide standard. Section 233.10 prohibits the exclusion of individuals or groups on "an arbitrary or unreasonable basis". Furtheremore, any conditions imposed "must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance Titles of the Social Security Act." It appears that subdivision 3a of Section 131a of the New York Social Services Law contravenes Federal regulation.

Exhibit B Annexed to Request for Admissions

Second we see no basis in Federal guidelines for denying entitlement to a fair hearing as provided for in the last sentence of subdivision 3b of the same State law. The Code of Federal Regulations Title 45 Sections 205.10(a)(3&5) require that a fair hearing be provided. The fact that the exception is applied for at the State rather than the county level does not relieve the State from complying with Federal fair hearing requirements.

Third we have questions about the limitations placed on emergency assistance as noted in Section 10 of the legislation. Specifically we believe there may be legal problems in eliminating the availability of emergency cash assistance to AFDC families as provided for in subdivisions two and three of Section 350j of the New York Law. We also believe there may be difficulty with your preclusion of EAF in the event of lost, stolen or mismanaged funds as noted in item (e) of subdivision 2 of the above-cited section.

As mentioned before, these are our preliminary views. When legal and program views are consolidated we will again communicate with you.

Sincerely,

Florence Aitchison
Associate Regional Commissioner
for Assistance Payments

Exhibit C Annexed to Request for Admissions

Directive Dated May 9, 1977

[LETTERHEAD OF]

NEW YORK STATE
DEPDRTMENT OF SOCIAL SERVICES
10 North Pearl Street
Albany, New York 12243

PHILIP L. TOIA
Commissioner

ADMINISTRATIVE DIRECTIVE

[An Administrative Directive is a written communication to local Social Services Districts providing directions to be followed in the administration of public assistance and care programs.]

Transmittal No: 77 ADM-28
[Income Maintenance]

Date: May 9, 1977

TO: Commissioners of Social Services

SUBJECT: Chapter 77 of the Laws of 1977
Emergency Assistance to Families

SUGGESTED
DISTRIBUTION: All Public Assistance Staff

CONTACT PERSON: Any questions concerning this release should be directed to John W. Hickey, Income Support Unit, by calling (800) 342-3715 extension 4-9224.

Exhibit C Annexed to Request for Admissions

I. *Purpose*

The purpose of this release is to advise local social services districts that bill section 10 of Chapter 77 of The Laws of 1977 has amended the Social Services Law in relation to the Emergency Assistance to Families Program. This chapter law, which amends Section 350-j, clearly limits the scope of EAF to avoid its expansion as a broad system of supplementary grants for persons receiving ADC and specifically prohibits emergency grant to duplicate regular public assistance grants which have been lost, stolen or mismanaged.

These provisions are effective May 1, 1977.

II. *Background*

EAF was designed to meet specific emergency needs of families with children and not to supplement public assistance grants to ADC and HR recipients. Recent court decisions (primarily the cases of *Domine and Gibson et al v. Lavine* and *Jones et al v. Lavine*) have expanded the availability of assistance under the EAF program. The courts held that the availability of EAF assistance may be limited by statute; however, the Department had attempted to limit the scope of EAF assistance through regulations without statutory authority. This new law now limits the scope of EAF.

III. *Program Implications*

ADC families will be ineligible for EAF in the form of cash grants since specific emergency cash needs

can be met through the regular ADC program. EAF will be utilized to meet the same specific emergency needh for HR families with children. EAF services will be available to both ADC and HR families and special fuel grants will be available if and for so long as Federal participation continues in the use of EAF to meet winter fuel for heating needs.

IV. *Required Action*

Implementation of this chapter law necessitates the following program requirements:

— EAF may be furnished to a family eligible for ADC only in the form of emergency services, and for winter fuel for heating needs if and for so long as federal funds are available for such purposes.

— EAF should be furnished to HR families with children to meet an emergency need resulting from a crisis situation threatening the family, or to meet urgent needs resulting from a sudden occurrence or set of circumstances demanding immediate attention.

— EAF may *not* be provided to replace or duplicate a public assistance grant already made to an ADC or HR family.

V. *Additional Information*

We are aware of a recent case in the U.S. Court of Appeals, second circuit (*Lynch v. Philbrook*) dealing

Exhibit C Annexed to Request for Admissions

with emergency assistance. Our preliminary analysis of this case indicates that it does not bar implementation of this statute. We will continue to follow this case and keep you advised of any future developments.

/s/ BLANCHE BERNSTEIN

Blanche Bernstein
Deputy Commissioner
Division of Income Maintenance

FILING REFERENCES

Previous ADMs/INFs—74 ADM-40, 74 ADM-150, 75 ADM-55, 75 ADM 57, 75 ADM-86.

Dept. Regs.—Part 372.

Social Services Law and Other Legal References—SSL § 350-j, Chapter 77 of Laws of 1977.

Bulletin/Chapter Reference -Bulletin 185.

Request for Admissions, September 8, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

To: Defendants Toia, Shang and Bates

Plaintiffs in the above entitled action request pursuant to Rule 36 of the Federal Rules of Civil Procedure that defendants Toia, Shang and Bates within thirty (30) days after service of this request admit, for the purpose of this action, the following facts are true.

1. Annexed hereto as Exhibit "A" is a true and complete copy of Program Guide Transmittal No. 162, issued by the Westchester County Department of Social Services, dated August 9, 1977, approved by defendant Charles W. Bates, "Subject: Emergency Assistance to Families (EAF)", pages 1-6 inclusive.

2. Transmittal No. 162, described in paragraph one (1), *supra,* was filed by defendant Bates, or by an officer, employee or agent of the Westchester County Department

of Social Services acting under the authority of defendant Bates, with the New York State Department of Social Services pursuant to 18 N.Y.C.R.R. §300.6 at least thirty (30) days prior to the effective date of Transmittal No. 162.

3. Transmittal No. 162, described in paragraph one (1), *supra*, became operative pursuant to 18 N.Y.C.R.R. §300.6 upon approval by the Commissioner of the New York State Department of Social Services, or in the alternative became operative after the passage of thirty (30) days after its filing without being disapproved by the Commissioner of the New York State Department of Social Services.

4. Annexed hereto as Exhibit "B" is a true and complete copy of a letter dated July 22, 1977 from Joseph J. Kelly, Regional Commissioner of the United States Department of Health, Education and Welfare to Carmen Shang, Acting Commissioner of the New York State Department of Social Services which states in relevant part that:

> "As advised in previous correspondence, recent New York State legislation restricting use of the EAF program present difficulties in view of the decision in *Mandley* v. *Trainor* 523 F.2d 415 (7th Cir. 1975). The legislation and resultant State Plan Amendment appear to contravene that court ruling.
>
> Therefore, we will be forwarding the plan amendment to our Central Office for review with the recom-

mendation that it be disapproved. Hugh O'Neill has been advised of our proposed action. . . ."

Dated: September 8, 1977
New Rochelle, New York

/s/ Martin A. Schwartz

Westchester Legal Services, Inc.
Eileen Landau, Of Counsel
Martin A. Schwartz, Of Counsel
99 Lincoln Avenue
New Rochelle, New York 10801
Tel: (914) 235-0906
Attorneys for Plaintiffs

The Legal Aid Society
Civil Division
John Kirklin, Of Counsel
Constance Carden, Of Counsel
11 Park Place
New York, New York 10007
Tel: (212) 227-2755
Attorneys for Plaintiffs

Exhibit A Annexed to Request for Admissions

Program Guide Transmittal No. 162 Dated August 9, 1977

PROGRAM GUIDE TRANSMITTAL No. 162

To: Distribution #5 (Non-Clerical)

ATTENTION: All Income Maintenance and Services Staff

APPROVED: CHARLES W. BATES DATE: 8-9-1977

SUBJECT: EMERGENCY ASSISTANCE TO FAMILIES (EAF)

EFFECTIVE DATE: Upon Receipt

INQUIRIES To: Mrs. Katharine Hayden, Director of I/M and Eligibility,
Room 631, County Office Building 2, 682-2551

Chapter 77 of the Laws of 1977 require major changes in the PROGRAM GUIDE, *Emergency Assistance to Families,* transmitted with PGT #105, 3/2/77. The PROGRAM GUIDE is to be discarded. Transmittal 105 is to be marked *Obsolete,* replaced by PROGRAM GUIDE, *Emergency Assistance to Families,* PGT #162, 8/9/77.

This transmittal should be detached and filed; the PROGRAM GUIDE should be filed in your binder or folder under *Emergency Assistance to Families.*

Cross-References:

PROGRAM GUIDE entitled *Home Economics Services,* (PGT #60), 9/1/76

INCOME MAINTENANCE SOURCE BOOK
B-g-01, Furnishing, Equipment
B-f-03, Statewide Monthly Standard of Need
C-a-10 through C-a-12, Emergency Assistance to Families

Exhibit A Annexed to Request for Admissions

PROGRAM GUIDE

[Page 1]

Emergency Assistance to Families (EAF)

Purpose of this Issuance

Chapter 77 of the Laws of 1977 and State Department of Social Services Regulations require major revisions in the guidelines for Emergency Assistance to Families. The present issuance supersedes all previous issuances on this subject. Provisions which are new are so indicated in the margin.

Following is a *Table of Contents*

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GENERAL POLICY

Emergency Assistance to Families includes aid, care and services—other than direct or indirect cash grants to a family eligible for ADC—granted to families with children, including migrant families, to deal with crisis situations threatening the family and to meet urgent needs resulting from a sudden occurrence or set of circumstances demanding immediate attention. NEW

The crisis must be verified and documented. The grants of assistance shall be only for such items of need as those allowed by Department Regulations and only in the amounts prescribed in the Statewide standards for all areas of need. Staff is responsible for verifying and authorizing the actual needs *up to and not exceeding* the maximum in the schedules. When amounts verified as needed exceed the amount of one month's grant under the category for which the family would in other circumstances be eligible, the Supervising Examiner must review the documentation befor signing the authorization. All emergency placements in hotels or motels must be approved by the District Director.

[Page 2]

ELIGIBILITY CRITERIA

FAMILIES ELIGIBLE FOR ADC ARE INELIGIBLE FOR DIRECT OR INDIRECT CASH GRANTS IN THE EAF CATEGORY SINCE SPECIFIC EMERGENCY NEEDS CAN BE MET THROUGH THE REGULAR ADC PROGRAM. NEW

— EAF may be furnished to a family eligible for ADC only in the form of emergency services and for winter fuel for heating needs if and for so long as federal funds are available for such purposes.

Exhibit A Annexed to Request for Admissions

— Following crisis, emergency placement of a child should be authorized in category EAF subject to time limitations of the category.

— Emergency Assistance to Families must be provided immediately to or on behalf of a needy child under the age of 21 and any other member of the household in which he is living if the conditions set forth above and all the following criteria are met:

- o Such child is (or, within six months prior to the month in which such assistance is requested, has been) living with an eligible relative caring for the child in a place of residence maintained by one or more of such relatives as his or their own home. An eligible relative is one who would be eligible to receive ADC for a child.

- o Such child is without resources immediately accessible to meet his needs and those needs cannot be met by an advance allowance.

  NOTE: Advance allowances are only those grants to recipients of public assistance, not applicants, to prevent shut-off of utilities or eviction due to non-payment of rent. Such advances are "recouped" from subsequent grants.

- o The emergency assistance is necessary to avoid destitution of such child or to provide living arrangements for him.

- o His destitution or need for living arrangements did not arise because he or a relative with whom he lives refused without good cause to accept employment or training for employment.

- o His destitution did not arise from the loss, theft or diversion of a grant already given. NEW

Exhibit A Annexed to Request for Admissions

MAXIMUM USE OF FEDERAL CATEGORIES

Initial Assistance

When determining the eligibility of a family which under usual circumstances would be eligible for H.R., initial assistance shall be authorized as EAF if the need for public assistance can be documented as the result of a sudden, unexpected occurrence or set of circumstances and the other basic criteria for EAF are also met. Generally, a family with children has encountered a crucial time in the struggle to be self-maintaining before making application for public assistance; the family crisis *resulting in the lack of money* for food, shelter or utilities *must be documented* and the emergency needs may be met in category EAF.

[Page 3]

Self-Supporting Families

If a self-supporting family applies for emergency assistance following a fire, flood or like catastrophe, categorical and financial eligibility must be explored. For example, if an applicant has been the victim of a fire and the usual income is not available or is insufficient to provide emergency needs and basic furniture, there may be eligibility for financial assistance. If the applicant has savings, bank accounts, savings certificates, etc., he/she would be expected to use all those resources as well as those which relatives, friends or employers might be able to provide.

Insurance, stocks or bonds do not usually provide immediately accessible resources although the applicant is required to free the assets as quickly as possible. Similarly, an applicant with earnings well above public assistance standards whose income would permit securing a loan or buying furniture on a deferred payment basis would be expected to use such resources as promptly as possible after the immediate, urgent, temporary needs have been met.

Exhibit A Annexed to Request for Admissions

TIME LIMITATIONS FOR CATEGORY EAF

EAF may be authorized during one period of 30 consecutive days in any 12 consecutive months, including payments to meet needs which arose before the 30 day period or which extend beyond the 30 days.

Although *30 consecutive* days may be in one month, they need not be in one calendar month, e.g., they may be 30 consecutive days beginning in one month and ending in another—9/15/76-10/14/76.

Similarly, 12 consecutive months may begin in any month and are not related to the calendar year. Therefore, the *first* time a family applies for Emergency Assistance to Families, it is advantageous to the family to determine if the assistance may be attributed to the previous year. If it is possible to authorize such assistance for that 12 month period because the family has not received such assistance in that time period, they may be eligible again in the subsequent 12 months should another catastrophe occur.

Example

Application: 9/76 Catastrophic loss of business; need for food and/or money for shelter has been documented.

Determine if assistance in the EAF category has been granted within 12 months. This requires counting backward from the month of application, i.e., September 1976 to October 1975.

If no EAF assistance has been given, eligible, therefore 9/76

Application: 2/77 Catastrophic loss, fire.

The 9/76 EAF was based on 12 consecutive months 10/75-9/76. Therefore, the 2/77 application may be

Exhibit A Annexed to Request for Admissions

accepted as it falls within a new 12 month period which *began* the month following last receipt (9/76). Eligible therefore 2/77

Next eligibility: 12 months must elapse from month following last receipt. Possible eligibility 2/78

Next eligibility: 12 months must elapse from month following last receipt: Possible eligibility 2/79

In summary: A family may be eligible for EAF during any 30 day period within any 12 consecutive months during which EAF has not been received.

[Page 4]

SCOPE OF ASSISTANCE

General Provisions

Following sudden crisis or catastrophic loss, EAF may include the following:

Money payments, vendor payments and payments in kind of food, clothing, household supplies and equipment, utilities, transportation, fuel for heating, shelter (including cost of repairs to recipient-owned homes), moving expenses, and other emergency needs which arose prior to the 30-day period for which EAF is authorized or which extend beyond the 30-day period such as rent or replacement of clothing or essential household furnishings. Applicants eligible for EAF may receive up to four months overdue utility bills provided they have not received a grant to cover that need. Payments made to meet the cost of repairs to recipient-owned homes shall not exceed $500 and such payments shall be made only when provision therefore cannot otherwise be made and the repair is essential for health and safety and the need for such repairs resulted from fire, flood or othe [sic] like catastrophe.

Exhibit A Annexed to Request for Admissions

NOTE: Agency policy requires that the necessity for all home repairs be discussed with the Supervisor of Housing who inspects the home and makes recommendations to the Deputy Commissioner; thereupon, Public Works or private vendors who submit estimates to the Deputy Commissioner are authorized to perform the repairs. When the work is completed satisfactorily, district staff is advised in writing of the amount to be authorized and the method of authorization.

Loss, Theft, Diversion Under Category EAF

Previously, when destitution was found to exist as a result of loss, theft or diversion of a grant already made, a prorated share of FCI (Statewide Standard of Need) was given in category EAF. NOW, EAF MAY *NOT* BE PROVIDED TO REPLACE OR DUPLICATE A PUBLIC ASSISTANCE GRANT ALREADY MADE TO AN ADC OR H.R. FAMILY. NEW

Heating Fuel

The fuel crisis has an adverse impact on the recipient population and the State Department of Social Services continues to encourage the use of EAF for families with children to meet *winter* fuel for heating needs. This procedure permits direct payment to fuel dealers thereby guaranteeing recipients' continuous service. Families eligible for ADC may continue to receive EAF payments-to-vendor for winter heating fuel. This is an exception to the new policy which prohibits payments in category EAF to those eligible for ADC.

A case-by-case determination must be made that a family is unable to meet fuel needs because of the energy crisis

and an emergency situation exists. This must be documented in the case record.

PROCEDURES

Application

Application for EAF is made on DSS-1994 (or DSS-2635 in districts using Combined Application).

[Page 5]

When an applicant for EAF alleges that his situation is one of immediate need, a *decision* must be made within 48 hours although the grant should be authorized in the usual manner. Certification/Recertification staff are responsible for advising applicants of their right to expedited Fair Hearing.

A new application is not required for those in receipt of cash assistance in another category.

Notification of Acceptance

The regular acceptance letter is to be used with the following message:

> Your application for *emergency assistance* has been accepted and you have received $——— and/or will receive $——— to meet emergency needs, viz. .....
>
> NOTE: IT IS NOT NECESSARY TO SEND A CLOSING LETTER.
>
> NEW

Notification of Denial

The regular denial letter is to be used with the word *emergency* inserted before the word *assistance.*

Authorization

o Fuel for Heat

Exhibit A Annexed to Request for Admissions

- Remove heating allowance from grant
- T/A

  Category remains F or H or V.
  Name and I.D. of vendor.
  Exception code field: EF
  Service code: 19
  Dates: (a) 10/1/76-5/31/77 or
  (b) *any* months within the heating period October through May, during which the procedure may be used.
  Amount: $00.01

The Bureau of Payment Processing will pay the vendor upon submission of claim.

- In homes which are heated by gas or electricity, consult page 8 of the PROGRAM GUIDE entitled *Home Economics Services,* PGT #60, 9/1/76, to determine how much of the gas and electric bill is for light, cooking, gas, etc.; deduct that amount from the regular *basic grant;* it will then be proper for the entire bill to be paid as the remainder will be the cost of heating fuel.

[Page 6]

o Services

- Until Services case openings and other actions are accommodated in the Turn-Around system, services related to catastrophe as it is defined in *General Policy* are to be reported on DSS-2562 (Social Services Reporting Record), with the eligibility code (item #7) of 04-EAF. The SSRR matrix (transmitted through ADM-102) must be checked for the correct goal code (item #11, DSS-2562).

Exhibit A Annexed to Request for Admissions

o **EAF T/A Procedure**

• Category	E
• Grant block	amount of grant
• Period covered	30 days, e.g. 0101-013077
• CF EAF date	last day of the current 12 month eligibility period
• At End of 30 Days:	*change from E category to H or V* Note
• To authorize a grant which is related to the emergency after the 30 day period:	
• Category	Remains H or V
• EXC field	Enter EF
• Period covered	original 30 day emergency period, e.g. 0101-013077 (even though date of authorizing is a month or several months later.)

Replaces Program Guide, *Emergency Assistance to Families,* transmitted with PGT # 105, 3/2/77

Cross-References:

Program Guide entitled *Home Economics Services,* (PGT #60), 9/1/76

Income Maintenance Source Book

B-g-01, Furnishings, Equipment

B-f-03, Statewide Monthly Standard of Need

C-a-10 through C-a-12, Emergency Assistance to Families

Exhibit B Annexed to Request for Admissions

Letter Dated July 22, 1977

July 22, 1977

Mr. Carmen Shang
Acting Commissioner
NYS Dept. of Social Services
40 North Pearl Street
Albany, NY 12243

Dear Mr. Shang:

As advised in previous correspondence, recent New York State legislation restricting use of the EAF program present difficulties in view of the decision in *Mandley* v. *Trainor* 523 F.2d 415 (7th Cir. 1975). The legislation and resultant State Plan Amendment appear to contravene that court ruling.

Therefore, we will be forwarding the plan amendment to our Central Office for review with the recommendation that it be disapproved. Hugh O'Neill has been advised of our proposed action.

If you have any questions, please contact Marlene Vidibor of our office of Family Assistance (212) 264-2892.

Sincerely yours,

Joseph J. Kelly
Regional Commissioner

MVIDIBOR/be/7/22/77

cc: Hugh O'Neill

Stipulation and Order re Goodwine and Selders Intervention

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

IT IS HEREBY STIPULATED AND AGREED by and between the respective attorneys for the parties herein that Freddie Mae Goodwine and Linda Selders be and they hereby are permitted to intervene in the above-entitled action and that they be and they hereby are brought in as party plaintiffs in the action, and

IT IS FURTHER STIPULATED AND AGREED that the proposed intervenors' complaint, as annexed to the motion by Freddie Mae Goodwine and Linda Selders to intervene in this action and for a preliminary injunction, shall be deemed to be the actual complaint of intervenors Goodwine and Selders; and

IT IS FURTHER STIPULATED AND AGREED that further service of the intervenors' complaint and service of a summons, be and hereby is waived; and

IT IS FURTHER STIPULATED AND AGREED that the hearing of the application for a preliminary injunction by intervenors Goodwine and Selders shall be consolidated with a trial on the merits of the above-entitled action; and

IT IS FURTHER STIPULATED AND AGREED that the answers of the defendants served herein in response to the complaint of Jeanne Bacon shall, insofar as applicable, be deemed to be also the answers to the intervenors' complaint.

(Signatures omitted in printing.)

Affidavit of Gertrude Parrish, July 13, 1977, in Support of Motion for Preliminary Injunction

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

State of New York)
County of Westchester) ss:

GERTRUDE PARRISH, being duly sworn, deposes and says:

1. I reside at 21 West Sidney Avenue, Mount Vernon, New York, together with my children, Ronnie, age 17, and Cathy, age 16, and my grandson, Reggie, age 8 months. I make this affidavit in support of my application to intervene in the above-entitled action, and for temporary relief enjoining the defendants from denying my application for emergency assistance pursuant to Chapter 77 of the 1977 Laws of the State of New York.

2 My family's sole source of income consists of public assistance in the category of A.F.D.C. in the amount of $45[illegible].00 per month, $200.00 of which is used for non-shelter needs of food, clothing and other incidental items, and the balance of which is sent directly by the Department of Social Services to my landlord to pay for my rent of $259.00 per month. My grant is issued to me on behalf of myself, my daughter Cathy, and my grandson, Reggie. I have no savings and no bank account. I own no stocks, bonds, real property or valuable personal property of any kind.

Affidavit of Gertrude Parrish

3. On July 1, 1977, I received my monthly A.F.D.C. grant for food, clothing and incidentals in the amount of $200.00. On that morning, I went to a check cashing service where I cashed the check and paid $92.00 for $130.00 of food stamps, leaving me with a balance of $108.00.

4. By July 2, 1977, I had spent $24.00 of the balance of my July grant in order to buy soap powder and detergent, to wash my family's clothes and to purchase other incidentals.

5. By July 2, 1977, I had also spent the $130.00 in food stamps in order to buy food for my family for the month of July.

6. On July 2, 1977, my family and I went to Orchard Beach from 1:00 P.M. to approximately 6:30 P.M. Before going to the beach, I left the balance of my grant, by then $84.00, wrapped up in some clothing in a drawer in a dresser in my bedroom.

7. Upon returning from the beach, when I entered my apartment, I noticed that the front door had been opened and that the window near the fire escape in my kitchen had been broken. My apartment had been ransacked and my family's clothes had been taken out of the dressers and were lying on the floor. The $84.00 I had placed in the drawer in the bedroom dresser was missing, as was all the food that I had purchased with my food stamps.

8. I immediately reported the theft to the Mount Vernon Police Department.

9. On July 5, 1977, I notified my caseworker at the Westchester County Department of Social Services of the

theft of the balance of my July grant and of the food I had purchased with the food stamps and I requested Emergency Assistance to replace the lost cash and food. I explained that I had no food left and no money with which to purchase food and other essential items for myself and my family.

10. On July 6, 1977, my caseworker's supervisor, Mr. Lebonitte, informed me that my application for Emergency Assistance had to be denied, because a new law provides that no Emergency Assistance may be given to needy families who are left without funds because of the loss or theft of a public assistance grant.

11. The sole basis for my ineligibility for Emergency Assistance is New York Social Services Law §350-j, as amended, which denies emergency assistance (1) in all cases of loss, theft or mismanagement of the regular public assistance grant; (2) in the form of cash grants to all families eligible for A.F.D.C.; and (3) in all cases to replace or duplicate a recurring public assistance grant pursuant to New York Social Services Law §131-a.

12. The aforesaid requirements of New York Social Services Law §350-j work an automatic denial of Emergency Assistance without regard to individual facts.

13. Were it not for the aforesaid requirements of New York Social Services Law §350-j, I would have been eligible to receive Emergency Assistance.

14. I meet all of the eligibility requirements for Emergency Assistance contained in the Federal Social Security Act, 42 U.S.C. §606(a), namely (1) I have not received

Emergency Assistance at any time within the last twelve months; (2) I reside with a needy child under the age of 21; (3) said child is without available resources; (4) assistance is necessary to avoid such destitution; and (5) such destitution did not arise because of a refusal to accept employment or training.

15. My family and I have suffered and continue to suffer grave and irreparable harm due to defendants' denial of my request for Emergency Assistance. Since I am solely dependent on my public assistance grant, the loss of cash has left my family with no money to meet our basic living needs. Most importantly, I cannot buy food for myself and the children.

16. Defendants have acted in bad faith by enforcing those portions of New York Social Services Law, §350-j referred to *supra*. Defendants knew or should have known that said provisions violate the Social Security Act and the regulations promulgated thereunder as construed in cases such as *Lynch* v. *Philbrook*, 550 F. 2d 793 (2d Cir. 1977), *Williams* v. *Wohlgemuth*, 540 F. 2d 163 (3rd Cir. 1976), and *Mandley* v. *Trainor*, 523 F. 2d 415 (7th Cir. 1975).

WHEREFORE, deponent respectfully prays that her application to intervene, for a temporary restraining order, and for a preliminary injunction, and for such other relief as to this Court appears just and proper, be granted.

/s/ GERTRUDE PARRISH

GERTRUDE PARRISH

(Jurat omitted in printing.)

Stipulation and Order re Parrish Intervention

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

IT IS HEREBY STIPULATED AND AGREED by and between the respective attorneys for the parties herein that GERTRUDE PARRISH be and she hereby is permitted to intervene in the above-entitled action and that she be and she hereby is brought in as a party plaintiff, and

IT IS FURTHER STIPULATED AND AGREED that the affidavit annexed hereto shall be deemed to constitute the "Factual Allegations" section of the complaint of Gertrude Parrish and that the sections of the Verified Complaint herein of Jeanne Bacon, entitled "Preliminary Statement," "Jurisdiction," "Parties" [to the extent of the paragraphs describing defendants Toia and Bates], "Class Action Allegations," "Legal Claims" and "Relief Requested" be deemed to constitute the parallel sections of the complaint of Gertrude Parrish; and

IT IS FURTHER STIPULATED AND AGREED that further service of the intervenor's complaint and service of a summons, be and hereby is waived; and

IT IS FURTHER STIPULATED AND AGREED that the hearing of the application for a preliminary injunction by intervenor Parrish shall be consolidated with a trial on the merits of the above-entitled action; and

IT IS FURTHER STIPULATED AND AGREED that the answers of the defendants served herein in response to the complaint of Jeanne Bacon shall, insofar as applicable, be deemed to be also the answers to the complaint of intervenor Parrish.

(Signatures omitted in printing.)

Stipulation and Order re Temporary Restraining Order for Parrish

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

IT IS HEREBY STIPULATED AND AGREED by and between the respective attorneys for the parties herein that the defendants be and they hereby are temporarily restrained from enforcing New York Social Services Law §350-j, as amended, to the extent that it denies Emergency Assistance 1) in all cases of loss, theft or mismanagement of the regular public assistance grant; 2) in the form of cash grants to all families eligible for A.F.D.C.; and 3) in all cases to replace or duplicate a recurring public assistance grant made pursuant to New York Social Services Law §131-a, in determining plaintiff intervenor Gertrude Parrish's application for Emergency Assistance.

(Signatures omitted in printing.)

Notice of Motion for Summary Judgment (Plaintiffs)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

TO THE DEFENDANTS:

PLEASE TAKE NOTICE that upon all of the papers heretofiled in this action, and more particularly upon the amended affidavits of Martin A. Schwartz, Jeanne Bacon, Freddie Mae Goodwine, Linda Selders, Gertrude Parrish, and Evelyn Isaac, and the exhibits annexed to these affidavits, upon the annexed Statement Pursuant to Rule 9-g of the General Rules of this Court, and upon Plaintiffs' Memorandum of Points and Authorities in support of this motion, plaintiffs will move this Court before a motion term at the United States Courthouse in Room 129, Foley Square, New York, New York, on the 20th day of September, 1977, at 4:00 P.M. or as soon thereafter as counsel can be heard for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting plaintiffs final judgment for the injunctive and declaratory relief prayed for in the complaint and plaintiff intervenors' complaints.

The grounds of this motion, as are more fully set forth in plaintiffs' Memorandum of Law, dated July 8, 1977,

Plaintiffs' Reply Memorandum of Law, dated July 15, 1977, and in Plaintiffs' Memorandum of Points and Authorities in support of this motion, are that there are no genuine issues of any material fact, and that plaintiffs are entitled to judgment as a matter of law in that New York Social Services Law section 350-j, as amended effective May 1, 1977, to the extent it denies Emergency Assistance in all cases of loss, theft or mismanagement of a public assistance grant, denies Emergency Assistance in the form of cash grants to all families eligible for A.F.D.C. assistance and denies Emergency Assistance to replace or duplicate a recurring public assistance grant made pursuant to New York Social Services Law, section 131-a, violates the federal Social Security Act, 42 U.S.C. sections 601 *et seq.* and the regulations promulgated thereunder, the Supremacy Clause of Article VI of the United States Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Plaintiffs further move that if summary judgment is not rendered in their favor for all of the relief prayed for herein, that the Court grant plaintiffs partial summary judgment and ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

PLEASE TAKE FURTHER NOTICE that any opposing affidavits and answering memoranda must be served upon

counsel for plaintiffs at least three (3) days before the return date of this motion.

Dated: August 31, 1977
White Plains, New York

Respectfully submitted,

/s/ Martin A. Schwartz
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Statement Pursuant to Rule 9-g

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

Plaintiffs respectfully submit this statement pursuant to Rule 9-g of the General Rules of this Court. The following are the material facts relevant to the determination of this controversy which plaintiffs contend are not in dispute:

A. *Plaintiff Jeanne Bacon*

1. Plaintiff Jeanne Bacon and her two minor children, Robert, age 5, and Ife, age 3, reside in Mamaroneck, New York.

2. Plaintiff Jeanne Bacon's family's sole source of income consists of public assistance in the category of Aid to Families with Dependent Children (AFDC) in the amount of $200 per month for herself and her children exclusive of rent. Her rent of $250 per month is paid by the Department of Social Services directly to plaintiff's landlord. Plaintiff has no savings and no bank account. Plaintiff owns no stocks, bonds, real property or valuable personal property of any kind.

3. On June 1, 1977, plaintiff received her monthly AFDC grant in the amount of $200 and proceeded to a local bank where she cashed the check, paid her Consolidated Edison and telephone bills totalling $50 and paid $76 for $130 worth of food stamps.

Statement Pursuant to Rule 9-g

4. Plaintiff put the food stamp coupons and the remaining cash totalling $74 in her wallet. From the bank, plaintiff walked to a grocery store in Mamaroneck. While shopping, plaintiff noticed that her wallet, which she had placed in her jacket pocket, was missing. Plaintiff promptly reported the theft of her wallet to the Village of Mamaroneck Police Department.

5. Plaintiff also immediately notified a Ms. Cohen, an employee of the White Plains office of the Westchester County Department of Social Services, of the theft and requested Emergency Assistance to replace the stolen cash and food stamps. Plaintiff explained that she had no money to purchase food and other essential items for herself and her two minor children.

6. On June 3, 1977, plaintiff was informed by Ms. Taylor, a Supervisor at the White Plains office of the Westchester County Department of Social Services, that her request for Emergency Assistance was denied on the basis of a "new law" which precludes the furnishing of Emergency Assistance to replace lost or stolen cash.

7. On June 6, 1977, plaintiff received the contents of her stolen wallet with the exception of the cash and food stamps in a plain envelope which arrived in the mail. A copy of this envelope is annexed to the affidavit of Jeanne Bacon as Exhibit "A".

8. On June 7, 1977, plaintiff called Ms. Taylor of the Department of Social Services to request a written denial

of her application for Emergency Assistance. By letter dated June 8, 1977, plaintiff's request for Emergency Assistance was denied. The letter stated in relevant part that:

> "Because of the implementation of bill section 10 of Chapter 77 of the Laws of 1977, which amends 350-j of the Social Services Law, the District Offices have been prohibited from authorizing emergency grants to duplicate public assistance monies which have been lost, stolen or mismanaged."

A copy of this letter dated June 8, 1977 is annexed to the affidavit of Jeanne Bacon as Exhibit "B".

9. The sole basis for plaintiff's ineligibility for Emergency Assistance is New York Social Services Law, 350-j, as amended, which denies Emergency Assistance (1) in all cases of loss, theft or mismanagement of the regular public assistance grant; (2) in the form of cash grants to all families eligible for AFDC; and (3) in all cases to replace or duplicate a recurring public assistance grant already made pursuant to New York Social Services Law, section 131-a. These requirements of New York Social Services Law, section 350-j, work an automatic denial of Emergency Assistance without regard to individual facts.

10. Were is not for the aforesaid requirements of New York Social Services Law, section 350-j, plaintiff would have been eligible to receive Emergency Assistance. Plaintiff meets all of the eligible requirements for Emergency Assistance contained in the Federal Social Security Act, 42 U.S.C. section 606(e).

Statement Pursuant to Rule 9-g

11. As a result of the denial of plaintiff's application for Emergency Assistance, plaintiff and her minor children suffered grave and irreparable harm. The theft of the family's public assistance grant left them with no money to meet their most basic living needs. Plaintiff had no money for transportation to take her children and herself to doctor and dental appointments.

12. On June 13, 1977, this Court issued a temporary restraining order requiring defendants to consider plaintiff Bacon's application for Emergency Assistance without regard to the three eligibility requirements contained in New York Social Services Law, section 350-j, as described in paragraph nine (9), *supra*.

13. As a result of the issuance of the temporary restraining order described in paragraph 12, *supra*, plaintiff's application for Emergency Assistance was granted by defendant Bates and Emergency Assistance to replace the stolen cash was provided to her.

B. *Plaintiff-Intervenor Freddie Mae Goodwine*

14. Plaintiff Freddie Mae Goodwine and her two minor children, Tanya, age 6, and Gary, age 10, reside in Yonkers, New York.

15. Plaintiff Freddie Mae Goodwine's family's sole source of income consists of public assistance in the AFDC category in the amount of $445 per month, $200 of which is that portion of the grant which is used for non-shelter

needs of food, clothing and other incidental items. She has no savings and no bank account. She owns no stocks, bonds, real property or valuable personal property of any kind.

16. On or about July 1, 1977, plaintiff received her monthly AFDC grant in the amount of $445 and went to a local bank where she cashed the check and purchased a money order in the amount of $245 to be used for rent. Plaintiff put the money order in her purse and put the remaining $200 cash in an envelope which she also put in her purse.

17. Plaintiff left the bank and went to the G & G Shop in Yonkers and tried on some clothing in a dressing room in that store. Plaintiff did not purchase the clothing she tried on and left her purse in a dressing room while she returned the items of clothing to a rack. Plaintiff's purse was out of her view for approximately two minutes.

18. Plaintiff returned to her home in the early evening of July 1, 1977, and noticed that the envelope in which she had placed the $200 in cash was not in her purse.

19. Plaintiff reported the loss of the cash to the Yonkers Police Department on July 5, 1977. On that same day plaintiff notified Ms. S. Feldsher, a Senior Examiner in the Yonkers District Office of the Westchester County Department of Social Services, of the loss and requested emergency assistance to replace the lost cash. Plaintiff explained that she had no money to purchase food and other essential items for herself and her children.

Statement Pursuant to Rule 9-g

20. By letter from the Westchester County Department of Social Services dated July 5, 1977, plaintiff's request for emergency assistance was denied. The letter states in relevant part:

> "No duplication of PA grants for *lost, stolen* or mismanaged funds.
>
> Section 10, Chapter 77 of Social Services Laws.
>
> EAF can be used for fuel or natural catastrophy."

A copy of the letter dated July 5, 1977 is annexed to the affidavit of Freddie Mae Goodwine as Exhibit "A".

21. The sole basis for plaintiff's ineligibility for Emergency Assistance are the three requirements for Emergency Assistance contained in New York Social Services Law, section 350-j, as amended, effective May 1, 1977, as described in paragraph nine (9), *supra.*

22. Plaintiff and her minor children suffered grave and irreparable harm due to defendants' denial of her request for Emergency Assistance. The loss of cash left plaintiff's family with no money to meet their basic living needs; plaintiff was unable to buy food for herself and her two minor children; plaintiff was unable to wash any clothes since she could not pay for the use of a laundromat nor purchase soap powder.

23. On July 11, 1977, this Court issued a temporary restraining order requiring defendants to consider plaintiff's application for Emergency Assistance free of the three eligibility requirements for Emergency Assistance

contained in New York Social Services Law, section 350-j, as amended, effective May 1, 1977, which are described in paragraph nine (9), *supra.*

24. Pursuant to this temporary restraining order described in paragraph 23, *supra,* defendants reconsidered plaintiff's application for Emergency Assistance. By letter from the Westchester County Department of Social Services dated July 12, 1977, plaintiff was informed that her application for Emergency Assistance was denied. The letter stated in relevant part:

> "Social Service Regulations provide for EAF only one time in a twelve month period. Since you received EAF on 9/23/76, you are not entitled to EAF at this time."

C. *Plaintiff-Intervenor Linda Selders*

25. Plaintiff Linda Selders and her minor son, MeQuan P. Selders, age 4, reside in Mount Vernon, New York.

26. The sole source of income of plaintiff Linda Selders' family is a monthly public assistance grant she receives on behalf of herself and her minor son in the AFDC category in the amount of $362, $212 of which intended to be applied towards her monthly rent of $225. She has no savings and no bank account. She owns no stocks, bonds, real property or valuable property of any kind.

27. On July 1, 1977, plaintiff received her monthly AFDC grant of $362, and a food stamp voucher authorizing her to purchase food stamps, and went to a check-cashing

service where she cashed the public assistance check. She put the money and the food stamp voucher in an envelope which she placed into her pocketbook.

28. During the evening of July 1, 1977, plaintiff paid her monthly rent to her landlord. Subsequently, she spent $38.22 in order to buy clothing for her son.

29. Only July 4, 1977, plaintiff and another tenant in the private house in which they both reside hosted a party at the house. Approximately seventy-five people were present at the party, including many persons whom plaintiff did not know personally. In an attempt to safeguard the balance of her public assistance grant, which was by then $82, and her food stamp voucher, plaintiff, in advance of the party, placed her pocketbook on the top of the lower bed of a high-rise bed.

30. Following the party, on the morning of July 5, 1977, plaintiff took her pocketbook from the high-rise bed and saw that the $82 and the food stamp voucher was missing. Plaintiff thereupon reported the theft of her money to the Police Department of the City of Mount Vernon.

31. On the afternoon of July 5, 1977, plaintiff informed her caseworker, Mr. N. Capriola, an Examiner employed by the Westchester County Department of Social Services, of the theft of the balance of her public assistance grant and of her food stamp voucher, and requested that the Department of Social Services issue to her a grant of Emergency Assistance to replace the stolen funds.

Statement Pursuant to Rule 9-g

32. Mr. Capriola informed plaintiff that her request for Emergency Assistance was denied because a "new law" provides that emergency assistance is not to be given to public assistance recipients whose need for such aid arises from the loss or theft of the proceeds of a public assistance grant. Mr. Capriola informed plaintiff that he will issue to her a new food stamp voucher, with which she could buy food stamps. Plaintiff was unable to use the voucher, however, since she had no funds and therefore could not convert the voucher into food stamps.

33. On July 6, 1977, plaintiff received from Mr. Capriola a written denial of her application for Emergency Assistance. The notice, dated July 6, 1977, stated:

> "Linda Selders has been denied EAF assistance to replace lost cash.
>
> Denial per-instructions of Administrative Letter number 77."

A copy of the notice is annexed to the Affidavit of Linda Selders as Exhibit "B".

34. The sole basis for the denial of plaintiff's application for Emergency Assistance is the three requirements for Emergency Assistance contained in New York Social Services Law, section 350-j, as amended, as described in paragraph nine (9), *supra*.

35. Were it not for the aforesaid requirements of New York Social Services Law, section 350-j, plaintiff would have been eligible to receive Emergency Assistance. Plaintiff met all of the eligibility requirements for Emergency Assistance contained in the Federal Social Security Act, 42 U.S.C. section 606(e).

Statement Pursuant to Rule 9-g

36. Plaintiff and her minor child suffered grave and irreparable harm due to defendants' denial of her request for Emergency Assistance. The loss of cash has left her family with no money to meet the family's basic living needs, plaintiff was unable to buy food for herself and her minor child, she was unable to wash any clothes since she was unable to pay for the use of a laundromat or purchase soap powder.

37. On July 11, 1977, this Court issued a temporary restraining order requiring defendants to consider plaintiff's application for Emergency Assistance free of the three requirements for Emergency Assistance contained in New York Social Services Law, section 350-j, as described in paragraph nine (9), *supra*.

38. Pursuant to the temporary restraining order described in paragraph 37, *supra*, plaintiff was found eligible for Emergency Assistance to replace the stolen funds.

D. *Plaintiff-Intervenor Gertrude Parrish*

39. Plaintiff Gertrude Parrish resides at 21 West Sidney Avenue, Mount Vernon, New York, together with her two children, Ronnie, age 17, and Cathy, age 16, and her grandson, Reggie, age 8 months.

40. Plaintiff's family's sole source of income consists of public assistance in the AFDC category in the amount of $459 per month, $200 of which is used for non-shelter needs of food, clothing and other incidental items. The balance of the grant is sent directly by the Department of Social Services to plaintiff's landlord to pay for the rent

of $259 per month. Plaintiff's grant is issued to her on behalf of herself, her daughter Cathy, and her grandson, Reggie. Plaintiff has no savings or bank account. Plaintiff owns no stocks, bonds, real property or valuable personal property of any kind.

41. On July 1, 1977, plaintiff received her monthly AFDC grant for food, clothing and incidentals in the amount of $200. On that morning, plaintiff went to a check cashing service where she cashed the check and paid $92 for $130 worth of food stamps, leaving her with cash in the amounnt of $108.

42. By July 2, 1977, plaintiff spent $24 of the balance of her July grant in order to buy soap powder and detergent, to wash her family's clothes and to purchase other incidentals.

43. By July 2, 1977, plaintiff had also spent the $130 in food stamps in order to buy food for her family for the month of July.

44. On July 2, 1977, plaintiff and her family went to Orchard Beach in the Bronx, New York from 1:00 P.M. to approximately 6:30 P.M. Before going to the beach, plaintiff left the balance of her grant, by then $84, wrapped up in some clothing in a drawer in a dresser in her bedroom.

45. Upon returning from the beach, when plaintiff entered her apartment, she noticed that the front door had been opened and that the window near the fire escape in her kitchen had been broken. Plaintiff's apartment had been ransacked and her family's clothes had been taken out of the dressers and were lying on the floor. The $84 she

had placed in the drawer in the bedroom dresser was missing, as was all the food that she had purchased with her food stamps.

46. On July 5, 1977, plaintiff notified her caseworker at the Westchester County Department of Social Services of the theft of the balance of her July grant and of the food she had purchased with the food stamps. Plaintiff requested that the Department of Social Services grant her Emergency Assistance to replace the lost cash and food. Plaintiff explained that she had no food left and no money with which to purchase food and other essential items for herself and her family.

47. On July 6, 1977, plaintiff's caseworker's supervisor, Mr. Lebonitte, informed plaintiff that her application for Emergency Assistance had to be denied, because a new law provides that no Emergency Assistance may be given to needy families who are left without funds because of the loss or theft of a public assistance grant.

48. The sole basis for plaintiff's ineligibility for Emergency Assistance is the three requirements for Emergency Assistance contained in New York Social Services Law, section 350-j, as amended, as described in paragraph nine (9), *supra*. Plaintiff met all of the eligibility requirements for Emergency Assistance contained in 42 U.S.C. section 606(e).

49. Plaintiff and her family suffered grave irreparable injury due to defendants' denial of her request for Emergency Assistance. The loss of cash left plaintiff's family without money to meet the family's basic living needs.

Plaintiff was unable to buy food for herself and her children.

50. Pursuant to a stipulation entered into between the parties herein, defendants agreed, *inter alia,* to consider plaintiff's application for Emergency Assistance without regard to the three requirements for Emergency Assistance contained in New York Social Services Law, section 350-j, as described in paragraph nine (9), *supra.*

51. The Westchester County Department of Social Services subsequently reconsidered plaintiff's application for Emergency Assistance and found plaintiff eligible for this assistance.

Dated: New Rochelle, New York
September 1, 1977

Respectfully submitted,

Westchester Legal Services, Inc.
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Martin A. Schwartz, Of Counsel
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Affidavit of Evelyn K. Isaac, Assistant County Attorney, June 27, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

State of New York)
County of Westchester) ss.:

EVELYN K. ISAAC, being duly sworn, deposes and says:

1. I am an Assistant County Attorney in the office of David N. Brainin, County Attorney of Westchester County, attorney for defendant CHARLES L. BATES, and am duly admitted to practice law in the Courts of this State and in this Court. I make this affidavit in support of defendant Toia's motion for a change of venue to the United States District Court, Northern District of New York.

2. This matter was commenced by the service of a verified complaint on or about June 9, 1977. In this action, plaintiff contests the validity of the New York Social Services Law §350-j as amended by Chapter 77 of the Laws of 1977, which deals with grants of emergency assistance. With respect to defendant Bates, plaintiff seeks *inter alia* a preliminary and permanent injunction enjoining defendant Bates from enforcing New York Social Services Law §350-j as amended by Chapter 77 of the Laws of 1977.

3. On June 20, 1977, plaintiff moved this Court for a preliminary injunction and made application for a temporary restraining order. On that day, Judge Lee P. Gagli-

ardi granted plaintiff's application for a temporary restraining order restraining the defendants from implementing New York Social Service Law §350-j as amended by Chapter 77 of the Laws of 1977 as to the named plaintiff, pending the hearing and determination of plaintiff's motion for a preliminary injunction.

4. Defendant Bates has fully complied with said temporary restraining order, and after interviewing Jeanne Bacon, plaintiff herein, provided Ms. Bacon with emergency assistance.

5. Subsequent to the commencement of this action and to the issuance of the temporary restraining order, this office was advised that an identical action, Clark v. Toia, had been previously commenced in the United States District Court for the Northern District of New York.

6. On June 27, 1977, this office received a copy of defendant Toia's notice of motion for a change of venue and memorandum of law in support of said motion.

7. In support of the motion for a change of venue, defendant Toia states that on the trial of this action he intends to call at least four witnesses and that these four witnesses live and work in Albany County. He further states that in light of Clark v. Toia which concerns issues identical to the issues herein, consolidation of this action with the Clark action would avoid a duplicity of suits and would prevent the possibility of inconsistent or conflicting Court orders concerning New York Social Services Law

§350-j as amended by Chapter 77 of the Laws of 1977. It is your deponent's opinion that the reasons set forth by defendant Toia for a change of venue are legitimate and satisfy the requirements and spirit of 28 U.S.C. §1404(a).

8. In that defendant Bates' posture as a defendant herein is based solely on the ground that he is complying with a statute duly enacted by the New York State Legislature, he does not intend to call any witnesses on the trial of this action and fully joins in defendant Toia's motion for a change of venue.

WHEREFORE, your deponent prays that this Court grant defendant Toia's motion for a change of venue to the United States District Court, Northern District of New York.

/s/ EVELYN K. ISAAC

EVELYN K. ISAAC

(Jurat omitted in printing.)

Opinion of the District Court, 437 F.Supp. 1371

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

Appearances:

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CHERYL J. BRADLEY, ESQ.
Of Counsel

GAGLIARDI, D.J.

The named plaintiffs, all recipients of public assistance in the form of Aid to Families with Dependent Children ("AFDC"), 42 U.S.C. §§601-610, bring this action pursuant to 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3), challenging the validity of Section 350-j of the New York Social Services Law ("NYSSL") as amended May 1, 1977 by the New York Laws of 1977, Chapter 77, Section 10 ("the 1977 amendment"). As explained more fully below, NYSSL §350-j establishes state eligibility requirements for emergency assistance grants disbursed pursuant to federal emergency assistance legislation, 42 U.S.C. §606(e). As a result of the 1977 amendment, §350-j now automatically denies emergency assistance payments (1) in the form of cash to families receiving or eligible to receive AFDC payments; (2) in all cases of loss, theft or mismanagement of a public assistant grant; and (3) in all cases when sought to replace or duplicate a recurring public assistance grant. Plaintiffs claim they applied for and were denied emergency assistance solely due to the 1977 amendment of NYSSL §350-j. They assert that §350-j, as amended, violates the Due Process and Equal Protection provisions of the Constitution. Plaintiffs also contend that the 1977 amendment is unauthorized

by and in conflict with the federal eligibility requirements provided in 42 U.S.C. §606(e) and is therefore invalid under the Supremacy Clause of Article VI of the Constitution. Suing on behalf of themselves and their minor children and all other persons similarly situated, plaintiffs seek an injunction against defendants' enforcement of the 1977 amendment to NYSSL §350-j and a declaratory judgment of its invalidity, pursuant to 28 U.S.C. §§2201 and 2202.

Defendant Philip Toia is sued individually and as Commissioner of the New York State Department of Social Services ("the State Commissioner"), in which capacity he is responsible for the state-wide administration of New York public assistance programs in general and for the enforcement of NYSSL §350-j, as amended, in particular. Defendant Charles Bates is sued individually and as Commissioner of the Westchester County Department of Social Services, in which capacity he acts as agent for the State Commissioner and is responsible for the administration of New York public assistance programs in Westchester County.[1]

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1. Plaintiffs additionally seek damages against the defendants in their individual capacities, under 42 U.S.C. §1983, alleging that they acted in bad faith in enforcing the challenged sections of NYSSL §350-j, as amended, in that they knew or should have known that those sections violated the Social Security Act. However, it appears from the present record that defendants' actions were consistent with and pursuant to the laws of New York State, and that this lawsuit is primarily an attack on a state statute and not defendants' actions taken under it. *See Rosado* v. *Wyman*, 414 F.2d 170, 178 (2d Cir. 1969), *rev'd on other grounds*, 397 U.S. 397 (1970). Nevertheless, since plaintiffs have not pressed their damage claims here, defendants have not moved to dismiss those claims, and, for the reasons discussed *infra*, this court does not now reach the merits of the constitutional claims, no opinion is expressed concerning the merits of plaintiffs' claim for damages. *See Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Jones* v. *Marshall*, 528 F.2d 132 (2d Cir. 1975).

Opinion of the District Court

Proceedings to Date

On June 13, 1977 this court issued a temporary restraining order which enjoined defendants from enforcing the provisions contained in the 1977 amendment to NYSSL §350-j in their consideration of plaintiff Jeanne Bacon's application for emergency assistance. A motion for class certification pursuant to Rule 23(b)(2), Fed. R. Civ. P., was filed on June 27, 1977. On August 2, pursuant to stipulations entered into by all parties, Gertrude Parrish, Freddie Mae Goodwine and Linda Selders were permitted to intervene as parties plaintiff on behalf of themselves and their minor children, and all prior pleadings, including the original complaint and motion for class certification, were made applicable to them. The court issued a temporary restraining order enjoining defendants from applying the contested portions of the 1977 amendment of NYSSL §350-j as to the applications for emergency assistance of Ms. Goodwine and Ms. Selders, and the defendants stipulated to refrain from applying the 1977 amendment to Ms. Parrish's application.

Upon agreement of the parties and pursuant to Rule 65(a)(2), Fed. R. Civ. P., the court determined to treat plaintiffs' application for a preliminary injunction as an application for a permanent injunction. Plaintiffs have moved for summary judgment pursuant to Rule 56, Fed. R. Civ. P., and have renewed their motion for class certification. Concluding that there is no genuine issue as to any material fact and that the disputed legal issues are clearly before it, this court has proceeded to decide the merits of plaintiffs' claim. *See Davis* v. *Smith*, 431 F.

Supp. 1206 (S.D.N.Y. 1977). For the reasons which follow and to the extent indicated below, the court grants plaintiffs' motion for class certification and their motion for summary judgment.

Facts

The essential facts, established by the pleadings and the affidavits submitted on plaintiffs' motion for summary judgment, are as follows:

Plaintiff Bacon lives in Mamaroneck, New York with two infant children. She has no bank account and owns no real property, securities or personal property of any value. Her sole sources of income consists of public assistance in the form of Aid to Families with Dependent Children (AFDC) amounting to $200 per month, excluding rent. Bacon received her monthly AFDC check on June 1, 1977, cashed it at her bank, paid utility and telephone bills totalling $50, and purchased $130 worth of food stamps for $76. While grocery shopping, Bacon discovered that her wallet containing the food stamps and remaining cash was missing. She promptly notified the Mamaroneck Police Department that her wallet had been stolen and also informed the White Plains office of the Westchester County Department of Social Services ("Westchester Social Services"). She explained that she was consequently without resources to purchase food and other essentials for herself and for her children, and requested emergency assistance relief.

On June 3, 1977 plaintiff Bacon was informed by Westchester Social Services that her application for emergency assistance was denied on the ground that the 1977 amendment to NYSSL §350-j prohibited the granting of emergency assistance to replace lost or stolen public assistance

funds. This denial and its justification were confirmed by Westchester Social Services in a letter dated June 8, 1977, sent to Ms. Bacon at her request.[2]

The circumstances which precipitated the applications for emergency assistance by plaintiffs Parrish, Goodwine and Selders were substantially similar. Each of these women resides in Westchester County with at least one minor child. None has a bank account or valuable personal property, and none owns securities or real property. The sole source of income for each consists of monthly AFDC assistance. In the case of each intervenor, her July 1, 1977 AFDC check was received and promptly cashed; various purchases were made for items such as food stamps, clothing and detergent; and the cash or food stamps remaining after the purchases were subsequently stolen or lost, leaving the victims without the means to buy food and other essentials. Each woman reported her loss to the local police and the appropriate office of Westchester Social Services and all three requested emergency assistance to enable them to purchase necessaries for themselves and their children for the month of July. Each was denied emergency assistance due to the 1977 amendment.

Ms. Goodwine, who suffered the loss of all of her cash, totalling $200 on July 1, was denied emergency assistance and informed by letter dated July 5 that the 1977 amendment provided there could be "no duplication of P[ublic]

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2. The June 8, 1977 letter from Westchester Social Services to Plaintiff Bacon stated in pertinent part:

> "Because of the implementation of bill section 10 of Chapter 77 of the Laws of 1977, which amends 350-J of the Social Services Law, the District Offices have been prohibited from authorizing emergency grants to duplicate public assistance monies which have been lost, stolen or mismanaged."

A[ssistance] Grants for *lost, stolen* or mismanaged funds" [emphasis in original].[3] Ms. Parrish's apartment was broken into and ransacked in her absence on July 2, 1977, and all of her remaining cash was stolen, as was all of the food ($130 worth) she had bought with her food stamps earlier that day. Her caseworker's supervisor at Westchester Social Services denied her application for emergency assistance on July 6, informing her that "a new law provides that no Emergency Assistance may be given to needy famailies who are left without funds because of the loss or theft of a public assistance grant."[4] Ms. Selders discovered that the balance of her cash and her unused food stamps voucher were missing from her house following a large social gathering there on the Fourth of July. Her application for emergency assistance to replace the lost cash was denied on the basis of the 1977 amendment,[5] al-

3. The July 5, 1977 letter from Westchester Social Services to Plaintiff Goodwine stated in its entirety:

> "No Duplication of PA Grants for *lost, stolen* or mismanaged funds. Section 10 Chapter 77 of Social Service laws of 1977. Amending Section 131 of Social Service laws. EAF can be used for fuel or natural catastrophy." [sic] [emphasis in original]

4. ¶47, Plaintiff's Affidavit in support of motion for summary judgment filed pursuant to Rule 9(g) of the General Rules of this court.

5. Plaintiff Selders received from Westchester Social Services a confirmation of the denial in the form of a memorandum addressed "To Whom It May Concern:"

> "Linda Selders has been denied EAF assistance to replace lost cash. Denial per-instructions of Administrative letter number 77."

"Administrative letter number 77," referred to in the quoted memorandum, was a Department of Social Services Directive, Transmittal No. 77 ADM-28, dated May 9, 1977, which advised all Commissioners of Social Services of the implementation of the 1977 amendment to §350-j of the Social Services Law. Exhibit A to answer of Defendant Bates.

though Westchester Social Services did inform her that it would issue a new food stamp voucher for her to use to buy food stamps. However, without cash Ms. Selders was unable to make use of the voucher, for the purchase of food stamps required payment of cash in conjunction with the submission of the voucher.

Statutes Involved

An understanding of plaintiffs' claim requires a brief review of the federal-state Aid to Families with Dependent Children program, 42 U.S.C. §§601-610, a close examination of its provisions for emergency assistance, 42 U.S.C. §606(e), and an analysis of New York's statutory plan for participation in the program. AFDC, one of several major categorical public assistance programs established by the Social Security Act of 1935, provides for the economic security of children by authorizing substantial federal funds to states choosing to participate in compliance with federal requirements. As described by the Supreme Court in *King* v. *Smith*, 392 U.S. 309, 316-17 (1968):

> The AFDC program is based on a scheme of cooperative federalism. See generally [U.S. Advisory Commission Report on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance (1964)] at 1-59. It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC

plan for the approval of the Secretary of Health, Education and Welfare (HEW). 49 Stat. 627, 42 U.S.C. §§601, 602, 603 and 604. See Advisory Commission Report, *supra*, at 21-23. The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW. 49 Stat. 627, as amended, 42 U.S.C. §602 (1964 ed., Supp. II) [footnote omitted].

Congress amended the AFDC statutory scheme in 1968 with the addition of 42 U.S.C. §606(e), which authorizes participating states to make "emergency assistance payments to needy families with children."[6] In brief, this legislation authorizes states to provide specified assistance to

6. Pub. L. No. 90-248, 81 Stat. 893 (codified in 42 U.S.C. §§603(a)(5), 606(e) (1970)). 42 U.S.C. §606(e) provides in pertinent part:

(e)(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary; but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

a child under 21 who is without available resources if the child is living with relatives specified in 42 U.S.C. §606(a), if the assistance is necessary to avoid the destitution of, or provide living arrangements for, such child, and if the emergency need did not arise because such child or relative refused without good cause to accept training or employment. Substantially identical provisions are set forth in the administrative implementing regulations, 45 C.F.R. §233.120(b)(1)(i)-(iv)(1976).

Prior to May 1, 1977, the effective date of the challenged amendment of NYSSL §350-j, the New York State requirements for eligibility for emergency assistance set out in §350-j were essentially the same as the federal eligibility requirements established by the emergency assistance provisions of the Social Security Act, 42 U.S.C. §606(e), *supra*.[7] The state emergency assistance eligibility requirements then in effect were described by the New York Court

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7. The pertinent sections of §350-j prior to the 1977 amendment provided as follows:

> §350-j. Emergency assistance to needy families with children
>
> 1. . . .
>
> 2. The term "emergency assistance" means aid, care and services furnished for a period not in excess of thirty days in any twelve month period, in the case of a needy child under the age of twenty-one who is living with a person related to him by blood, marriage or adoption who is eligible to receive aid to dependent children on his behalf pursuant to this chapter and regulations of the department.
>
> 3. Emergency assistance to needy families with children shall be provided in accordance with the regulations of the department for children who are without available resources, and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home, and such destitution or such need did not arise because such children or relatives refused without good cause to accept employment or training for employment.

of Appeals in *Jones* v. *Berman*, 37 N.Y.2d 42 (1975) and their essential identity with federal requirements was noted:

> The phraseology and requirements existent in section 350-j of our Social Services Law reflect the applicable Federal provisions (U.S. Code, tit. 42, §606, subd. [e]; 45 C.F.R. 233.120).
>
> In section 350-j of the Social Services Law, the Legislature lists five requirements that must coexist before an applicant is entitled to emergency assistance: (1) Federal aid must be available; (2) the needy child must be under 21 years of age; (3) the child must be living with a person related to him or her by blood, marriage or adoption; (4) the assistance must be necessary to avoid destitution; and (5) the destitution must not have arisen because the child or relative refused without good cause to accept employment. The same requirements must be established under Federal law (U.S. Code, tit. 42, §606, subd. [e]; 45 CFR 233.120).

Id., at 52.

Effective May 1, 1977, however, §350-j was amended to add three new substantive conditions concerning the eligibility of AFDC and other public welfare recipients for emergency assistance.[8] Needy children and households

8. By virtue of the 1977 amendment, Sections 2 and 3 of NYSSL §350-j now provide as follows:

> 2. For purpoces of this section, the term "emergency assistance" means aid, care and services authorized during a period not in excess of thirty days in any twelve month period to meet the emergency needs of a child or the household in which he is living, in the following circumstances:
>
> (a) where the child is under twenty-one years of age; and

(footnote continued on next page)

currently eligible for or receiving AFDC assistance are now automatically ineligible for grants of cash assistance. §350-j(2)(c), as amended. In the case of any applicant currently receiving public assistance, emergency assistance is automatically denied if the emergency resulted from the loss, theft or mismanagement of a regular public assist-

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(b) the child is living with, or within the previous six months has lived with, one or more persons specified in subdivision b of section three hundred forty-nine of this chapter; and

(c) in cases of application for grants of cash assistance, such child or such household is not categorically eligible for or receiving aid to dependent children; and

(d) such emergency needs resulted from a catastrophic occurrence or from a situation which threatens family stability and which has caused the destitution of the child and/or household; and

(e) such occurrence or situation could not have been foreseen by the applicant, was not under his control and, in the case of a person receiving public assistance, did not result from the loss, theft or mismanagement of a regular public assistance grant; and

(f) the emergency grant being applied for will not replace or duplicate a public assistance grant already made under section one hundred thirty-one-a of this chapter.

3. Emergency assistance to needy families with children shall be provided to the extent of items of need and services set forth in sections one hundred thirty-one and one hundred thirty-one-a of this chapter, and items of medical services set forth in section three hundred sixty-five-a of this chapter, and in amounts set forth in the regulations of the department for children who are without available resources, and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home, and such destitution or such need did not arise because such children or relatives refused without good cause to accept employment or training for employment. Such emergency assistance, but not including cash grants, may be furnished to a family eligible for aid to dependent children only in the form of emergency services, and so long as federal aid remains available, for emergency fuel grants in the form of vendor restricted payments.

ance grant. §350-j(2)(e), as amended. Finally, the application for emergency assistance is automatically denied if it will replace or duplicate a public assistance grant previously made. §350j-(2)(f), as amended. Each of these provisions is challenged on equal protection and due process grounds, and as inconsistent with and violative of the emergency assistance provisions of the Social Security Act. 42 U.S.C. §606(e).

Jurisdiction

In their major objection to this court's consideration of the merits of plaintiffs' claim, defendants dispute this court's jurisdiction to entertain the lawsuit.[9] It is settled

9. In addition, defendants urge that this court abstain from deciding this case as a matter of discretion, pending the outcome of the Supreme Court's review of *Mandley* v. *Trainor*, 545 F.2d 1062 (7th Cir. 1976), *cert. granted sub nom. Owen* [sic] v. *Mandley* and *Califano* v. *Mandley*, 45 U.S.L.W. 3785 (U.S. June 7, 1977) (Nos. 76-1159, 76-1416). This court declines to do so. Admittedly, among the several questions presented for the Court's consideration in *Mandley* is whether a state that elects to maintain an emergency assistance plan under 42 U.S.C. §606 must provide relief for all types of destitution for all needy children and their families or whether it may choose what types of destitution it will alleviate. 45 U.S.L.W. 3785. However, the primary holding of the Court of Appeals for the Seventh Circuit declared invalid the attempt by Illinois to circumvent established requirements under 42 U.S.C. §606(e) by implementing an alternative emergency assistance plan and procuring federal funds under 42 U.S.C. §603(a). 545 F.2d at 1064 and n.2, 1068-71. Supreme Court review is addressed to that issue as well as to other issues not before this court. Because the controlling case law, discussed *infra*, is firmly established and unambiguous, because the probability of an immediate and substantial revision of that law by the Supreme Court is not great, and because the nature of the claims raised and relief sought by plaintiffs concerns the emergency requirements of innumerable families in severe circumstances threatening their welfare, this court concludes that its discretion is best exercised by proceeding promptly to the merits of the case.

that when a state statute is challenged as violative of both the federal Constitution and the Social Security Act, subject matter jurisdiction under 28 U.S.C. §1343(3) is established as to each claim if the constitutional challenge is not insubstantial. *Hagans* v. *Lavine,* 415 U.S. 528, 536-543 (1974; *see Andrews* v. *Maher,* 525 F.2d 113 (2d Cir. 1975). In *Hagans* v. *Lavine, supra,* the Supreme Court set out the standards for determining whether an alleged constitutional question is too insubstantial to support the assertion of federal jurisdiction under 28 U.S.C. §1343(3). To justify dismissal for lack of jurisdiction, the Court there explained, the constitutional cause of action must be "patently without merit," *id.* at 542, *quoting Bell* v. *Hood,* 327 U.S. 678 at 683 (1946), or "so insubstantial, implausible, foreclosed by prior decision of this Court or otherwise completely devoid of merit as to not involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits," *id.* at 543, quoting *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 at 666-67 (1974). *See also Goosby* v. *Osser,* 409 U.S. 512, 518 (1973).

This court concludes that for jurisdictional purposes these "very minimal standards of merit", *Andrews* v. *Maher, supra,* 525 F.2d at 116, are sufficiently met by plaintiffs' claim that the 1977 amendments to NYSSL §350-j violate the equal protection clause of the Fourteenth Amendment. The 1977 amendments deny emergency assistance in all cases in which the emergency resulted from loss, theft, or mismanagement of a regular public assistance grant, deny cash emergency assistance to those eligible for or receiving AFDC only, and deny emergency assistance

in all cases to replace or duplicate a recurring public assistance grant. The Second Circuit has determined that the imposition of similar legislative restrictions on public assistance recipients for purposes of eligibility for emergency assistance gives rise to a constitutional claim sufficiently substantial to establish jurisdiction under 28 U.S.C. §1343(3). *Lynch* v. *Philbrook*, 550 F.2d 793, 794-795 (2d Cir. 1977); *see also Ingerson* v. *Sharp*, 423 F. Supp. 139, 141-142 (D. Mass. 1976). Other federal courts have determined tnat emergency assistance eligibility restrictions conditioned on the underlying causes of the emergency may also raise a jurisdictionally sufficient constitutional question. *See, e.g., Williams* v. *Wohlgemuth*, 540 F.2d 163, 164-166 (3rd Cir. 1976); *Mandley* v. *Trainor*, 523 F.2d 415, 419 n.2 (7th Cir. 1975); *Ingerson* v. *Sharp, supra; Burrell* v. *Norton*, 381 F. Snpp. 339 (D. Conn. 1974). *See also Holley* v. *Lavine*, 529 F.2d 1294, 1295-96 (2d Cir. 1976). Accordingly, upon viewing their equal protection contention in light of the substantiality standard espoused in *Hagans* v. *Lavine, supra*, this court canot say plaintiffs' constitutional claim is "completely devoid of merit," and consequently jurisdiction under 28 U.S.C. §1343(3) is proper.

Jurisdiction having been established over the constitutional claims, this court properly has pendent jurisdiction to consider the statutory claim which challenges the 1977 amendment as violative of the Social Security Act and the Supremacy Clause. *Hagans* v. *Lavine, supra*, 415 U.S. at 536, 543; *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 412 n.11 (1973); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *Lynch* v. *Philbrook, supra*, 550 F.2d at 795. In ac-

cordance with the established principle of deciding cases on statutory rather than constitutional grounds, it is this court's duty to decide plaintiffs' Social Security Act statutory claim first and, if it proves dispositive, not to reach the equal protection and due process claims. *Hagans* v. *Lavine, supra,* 415 U.S. at 543; *Dandridge* v. *Williams,* 397 U.S. 475-76 (1970); *Rosado* v. *Wyman, supra,* at 402; *King* v. *Smith,* 392 U.S. 309, 312 n.3 and 313 (1968); *see Andrews* v. *Maher, supra,* 525 F.2d at 116 and n.5; *Cordova* v. *Reed,* 521 F.2d 621, 625 (2d Cir. 1975).

Class Certification

Before reaching the merits, however, the court addresses plaintiffs' motion for class certification pursuant to Rule 23(b)(2), Fed. R. Civ. P. Plaintiffs seek to have certified a class composed of those persons who are residents of New York State, who are relatives of and reside with a needy child under the age of 21, and who have been or may be denied requests for emergency assistance due to defendants' enforcement of the challenged provisions of the 1977 amendment of NYSSL §350-j. In support of their request, plaintiffs contend that class relief should be granted in part to avoid any risk of mootness. The court concludes that the prerequisites for maintaining a class action contained in Rules 23(a) and 23(b)(2), Fed. R. Civ. P., are satisfied and that it is preferable for this suit to be maintained as a class action pursuant to those rules, as explained below.

The requirement of Rule 23(a)(1), that the class be so numerous that joinder is impracticable, is plainly met.

Although plaintiffs do not specifically allege the number of AFDC or other public assistance recipients who may encounter sudden crises necessitating application for emergency assistance, it is apparent that the total must reach well into the hundreds, perhaps thousands. Defendants do not dispute plaintiffs' representation that as of December, 1976, more than 1,200,000 persons were receiving AFDC assistance alone, citing *Social statistics,* New York Department of Social Services. If only a tiny fraction of these individuals should seek cash assistance, suffer the loss or theft of their AFDC grant and seek emergency assistance, or otherwise seek to replace or duplicate a public assistance grant, a sufficiently large class of applicants would be faced with the automatic and categorical denials of eligibility imposed by NYSSL §§350-j(2)(c), (e) and (f), as amended, discussed *supra,* to make joinder impracticable. Consequently, the numerosity requirement of Rule 23(a)(1) is satisfied.

Rule 23(a)(2) requires that there be questions of law or fact common to the class, and Rule 23(a)(3) that the claims of representative parties be typical of the claims of the class. Both of these requirements are met if the proposed plaintiff class is divided, pursuant to Rule 23(c)(4), into three subclasses challenging the amended NYSSL §§350-j(2)(c), 350-j(2)(e), and 350-j(2)(f), respectively. The first subclass, of whom plaintiff Selders is a representative party, consists of those applicants for emergency assistance who pursuant to §350-j(2)(c), were automatically denied relief in the form of cash because they were eligible for AFDC. The second subclass, repre-

sented by plaintiffs Bacon, Goodwine and Parrish, consists of those applicants for emergency assistance who, pursuant to §350-j(2)(e), were automatically denied assistance because their emergency situations arose from the theft or loss of a regular public assistance grant. The final subclass, also represented by plaintiffs Bacon, Goodwine and Parrish, is made up of those applicants who, pursuant to §350-j(2)(f), were automatically denied emergency assistance on the ground that it would replace or duplicate a previous public assistance grant.

With this subdivision it is clear that each disputed section of the amended statute is either valid or invalid as to all class members who are denied emergency relief based on its respective eligibility conditions. Although the particular factual circumstances surrounding each individual emergency assistance application will vary from one to another, the aspects of the amended law which are here challenged are its automatic exclusions from eligibility for emergency assistance based on the nature of the emergency or the status of the applicant. These facts will not vary from member to member in each subclass, and the question of law common to each is whether the disputed provision of New York law constitutes an impermissible restriction on federal eligibility standards established in the Social Security Act. Rule 23(a)(2) is thus satisfied. *Escalera* v. *New York City Housing Authority*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970). For the same reasons, the claims of the named plaintiffs are typical of the members of the respective subclass of which they are repretative parties, as noted above. Consequently, Rule 23(a)(3) is also satisfied.

Further, it is clear that the named plaintiffs will fairly and adequately represent the interests of the subclasses, for plaintiffs' interests and those of the class members are identical and without conflict. Moreover, the legal services organizations acting as counsel for plaintiffs are undisputedly capable of providing competent and adequate representation. Rule 23(a)(4) is thus met.

In addition, the provisions of subdivision (b)(2) of Rule 23 are also satisfied. Rule 23(b) states that an action may be maintained as a class action if the requirements of Rule 23(a) are met and, further,

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Final injunctive relief is the primary remedy sought by plaintiffs and is plainly appropriate here where defendants have acted to enforce the provisions of NYSSL §350-j(2), as amended, so as to preclude consideration for emergency assistance "on grounds generally applicable to the class" or subclasses. The final order of this court will thus have the effect of "settling the legality of [defendants'] behavior with respect to the class as a whole." Notes of Advisory Committee on 1966 Amendment of Rule 23, Subdivision (b)(2).

Class action status has been certified in cases, similar to the present suit, in which state emergency assistance eligibility conditions have been challenged as invalid under the Social Security Act. *See, e.g., Ingerson* v. *Sharp,*

supra, 423 F. Supp. at 142; *Williams* v. *Wohlgemuth*, 400 F. Supp. 1309, 1314 (E.D. Pa. 1975), *aff'd*, 540 F.2d 163 (3d Cir. 1976); *Kozinski* v. *Schmidt*, 409 F. Supp. 215, 218 (E.D. Wis. 1975). Class certification has also been granted regularly in cases involving court invalidation of other statewide welfare statutes or regulations. *See, e.g., Hurley* v. *Toia*, 432 F. Supp. 1170 (S.D.N.Y. 1977); *Viverito* v. *Smith*, 421 F. Supp. 1305, 1311-1313 (S.D.N.Y. 1976); *Aitchison* v. *Berger*, 404 F. Supp. 1137, 1143 (S.D.N.Y. 1975), *aff'd without opinion*, 538 F.2d 307 (2d Cir.), *cert. denied*, 429 U.S. 890 (1976); *Almenares* v. *Wyman*, 334 F. Supp. 512, 518-519 (S.D.N.Y.), *aff'd as modified*, 453 F. 2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); *Hurley* v. *VanLare*, 365 F. Supp. 186, 189-191 (S.D.N.Y. 1973), *rev'd on other grounds sub nom. Taylor* v. *Lavine*, 497 F.2d 1208 (2d Cir. 1974), *rev'd sub nom. VanLare* v. *Hurley*, 421 U.S. 338 (1975); *Gaddis* v. *Wyman*, 304 F. Supp. 717, 721 (S.D.N.Y. 1969) (three-judge court), *aff'd per curiam sub nom. Wyman* v. *Bowens*, 397 U.S. 49 (1970). Plaintiffs seek to represent all persons otherwise eligible to apply and to be considered for emergency assistance who are automatically denied such eligibility due to defendants' enforcement of the challenged section of the 1977 amendment of NYSSL §350-j. As recognized in similar circumstances, "[t]his is a classic case for treatment as a class action under Fed. R. Civ. P. 23(b)(2)." *Aitchison* v. *Berger*, *supra*, 404 F. Supp. at 1143.

Although defendants have not contended that this case is moot as to any plaintiff, this court does take note that subsequent to the filing of the complaint, defendants have

considered each named plaintiff's application for emergency assistance in the manner requested by plaintiffs, that is, without reference to the challenged provisions of the amended NYSSL §350-j. As to plaintiffs Bacon, Goodwine and Selders, defendants refraining from applying the contested statutory provisions pursuant to the order of this court; as to plaintiff Parrish, defendants stipulated to do so. It could be suggested that the named plaintiffs thus no longer have an active controversy with defendants and that consequently the case is moot.[10] However, it is clear that as of the filing of the complaint and the motions to intervene there existed a real and immediate controversy and the request for and grant of class certification extinguishes any possible mootness claim.

In *Sosna* v. *Iowa*, 419 U.S. 393 (1975), the Supreme Court explained that upon certification of a class action, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the named plaintiff]," *id.*, at 399, and that the interest of the class may survive that of the plaintiff and thus prevent mootness. This class interest survives even though defendants' actions arguably rendered the individual plaintiffs' claims moot prior to a judicial determination of the certification issue. As the *Sosna* court stated:

10. For example, defendant Bates affirmately [so in original] alleged in his Answer, ¶14, that subsequent to the court's restraining order issued on behalf of plaintiff Bacon, defendant Bates reviewed plaintiff's application for emergency assistance according to the guidelines of former NYSSL §350-j; he determined that she was eligible for relief; and she received a grant of emergency assistance.

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such cases, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claims that otherwise the issue would evade review.

Id. at 402 n.11.

The circumstances of this lawsuit clearly support the claim that without class certification "relating back" to the filing of the complaint, the issue of the validity of NYSSL §350-j, as amended, would evade review. Of course, this is not a case in which the passage of time changes the circumstances of a specific plaintiff and thus moots that plaintiff's claim. *Cf. Roe* v. *Wade,* 410 U.S. 113 (1973). Here the mootness could be "created by the action of the defendant who could agree to the payment of [the benefits sought by a plaintiff] every time an action is instituted." *Lugo* v. *Dumpson,* 390 F. Supp. 379, 381 (S.D.N.Y. 1975). *See also Hurley* v. *Toia, supra,* 432 F. Supp. at 1175 and n.9; *Viverito* v. *Smith, supra,* 421 F. Supp. at 1307.

The very nature of an application for emergency assistance guarantees that the immediate dispute between an applicant and the New York Department of Social Services will be short-lived. Such an application requires prompt action, and in any event emergency assistance cannot be sought for a period in excess of 30 days in any 12 month period. 42 U.S.C. §606(e)(1). There is no doubt that defendants intend, and indeed are required, to enforce NYSSL §350-j, as amended, in the future. Consequently,

the circumstances of ths case plainly warrant the "relation back" of class certification to the filing of the complaint. *Gerstein* v. *Pugh*, 420 U.S. 103, 110-111 n.11 (1975); *Sosna* v. *Iowa, supra*, 419 U.S. at 402 n.11; *Zurak* v. *Regan*, 550 F.2d 86, 91-92 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3837 (June 28, 1977); *Williams* v. *Wohlgemuth, supra*, 540 F.2d at 166-167; *Frost* v. *Weinberger*, 515 F.2d 57, 62-64 (2d Cir. 1975), *cert. denied*, 424 U.S. 958 (1976); *Lugo* v. *Dumpson, supra*, 390 F. Supp. at 381; *cf. Brown* v. *Lynch*, 415 F. Supp. 740 (D. Conn. 1976); *Robinson* v. *Leahy*, 73 F.R.D. 109 (N.D. Ill. 1977).

Since the requirements of Rule 23, Fed. R. Civ. P., are fully satisfied, and defendants have not suggested nor has the court discerned any prejudice resulting from class certification, plaintiffs may proceed as a class without further assuming the burden of proving its necessity.[11] *Percy* v. *Brennan*, 384 F. Supp. 800, 811 (S.D.N.Y. 1974). Class

11. Defendants urge that class relief should be found unnecessary, despite compliance with Rule 23 requirements, because the prospective effect of injunctive relief granted to the named plaintiffs prohibits the enforcement of a state statute and thus inures to the benefit of all proposed class members, citing *Galvan* v. *Levine*, 490 F.2d 1255 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

However, in *Galvan* v. *Levine* denial of class certification was affirmed because the state not only made clear that it would be bound by an adverse judgment but in fact "withdrew the challenged policy more fully than the Court ultimately decreed and stated that it did not intend to reinstate the policy." 490 F.2d at 1261. Here there has been no assurance by the state that its welfare officials will apply the court's judgment to all similarly situated persons, and in fact there is some uncertainty as to whether it would do so. In a letter to the court dated Aug. 22, 1977, addressed in part to plaintiffs' motion for class certification, counsel for the State Commissioner asserted that "questions of fact remain as to the need for class relief *if* the State were to follow a final decision (*i.e.* as affirmed, if an appeal were taken) as a matter of stare decisis." [emphasis added]

certification based on the subdivisions described *supra* is therefore granted.

The Merits

This court must conduct its examination of each of the three challenged statutory provisions bearing in mind the general standard for determining whether AFDC plans are violative of the Social Security Act. It is by now well established that although participation in the AFDC program by any state is entirely voluntary, once a state has chosen to participate and has implemented its own AFDC plan "a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause" in the absence of clear Congressional authorization for such exclusion. *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971). *See Philbrook* v. *Glodgett*, 421 U.S. 707, 719 (1975); *VanLare* v. *Hurley*, 421 U.S. 338 (1975); *Burns* v. *Alcala*, 420 U.S. 575 (1975); *Carleson* v. *Remillard*, 406 U.S. 598 (1972); *King* v. *Smith*, *supra*. Pursuant to this general rule that a state's AFDC program is invalid if it restricts eligibility beyond federal requirements, the Court of Appeals for the Second Circuit has held that once a state has decided to enact an AFDC emergency assistance plan pursuant to 42 U.S.C. §606(e), "it [is] bound to follow the eligibility conditions established by federal law," *Lynch* v. *Philbrook*, *supra*, 550 F.2d at 795, and "a state's definition of an emergency may not be more restrictive than that provided by the [Social Security] Act." *Hagans* v. *Berger*, 536 F.2d 525, 532 (2d

Cir. 1976). *Accord, Mandley* v. *Trainor,* 523 F.2d 415 (7th Cir. 1975). Consequently, this court must determine whether the challenged sections of the May 1977 amendment to §350-j of the New York Social Services Law unduly restrict the federal standards of eligibility for emergency assistance under 42 U.S.C. §606(e).

§350-j(2)(c)—Denial of cash emergency assistance to applicants eligible for AFDC

In its provision for authorization of cash assistance, the amended state statute draws a restrictive distinction between applicants for emergency assistance who are eligible for AFDC, and those who are not. As to families receiving or eligible for AFDC, emergency assistance in the form of cash is automatically prohibited and emergency services alone are available. NYSSL §350-j(2)(c) and (3), am amended. Applicants not receiving or eligible for AFDC, however, are entitled to emergency assistance in the form of either services *or* cash. This court concludes that this absolute and categorical denial of cash assistance solely to applicants receiving or eligible for AFDC is a state eligibility standard which subjects AFDC recipients to more restrictive conditions than those imposed on other emergency assistance applicants, including other public assistance recipients. This provision is therefore invalid as being inconsistent with and violative of the Social Security Act. *Lynch* v. *Philbrook,* 550 F.2d 793 (2d Cir. 1977).

In *Lynch* v. *Philbrook, supra,* the Second Circuit invalidated Vermont's emergency assistance eligibility con-

ditions because they required families receiving AFDC to demonstrate that their emergency was due to one of several specified cases, a categorical requirement not imposed on families who were not receiving AFDC. As the Court made clear, "both the structure of the Act itself and its legislative history show that the E[mergency] A[ssistance] program was designed to cover, at a minimum, AFDC recipients." *Id.*, at 796. Since the added burden placed by the state on AFDC recipients narrowed the definition of emergency as to them alone, the state eligibility requirement was held to constitute a restrictive and invalid discrimination against the class of AFDC recipients. *Id.* at 797.

The analysis of *Lynch* is equally applicable here, where the state has categorically precluded the availability of cash emergency assistance only in the cases of those families receiving or eligible for AFDC. This is an impermissible discrimination against AFDC families and directly contrary to Congressional intent. *Lynch* v. *Philbrook, supra,* 550 F.2d at 796-797. The disputed restriction is not merely a formal one, for as a practical matter denial of *cash* emergency assistance may amount to a denial of *any* emergency assistance. As the circumstances of plaintiff Selders make evident, the denial of cash assistance to an applicant may prevent his or her conversion of a food stamps voucher into negotiable food stamps. Consequently, the alternative offer by the state of a food stamp voucher may represent a meaningless gesture which leaves the applicant with no assistance at all. Although the Social Security Act does leave the states with general discretion

as to the form of assistance or payments to be made, 42 U.S.C. §606(e)(1)(A); *see Williams* v. *Wohlgemuth*, 540 F.2d 163, 169 (3rd Cir. 1976); *Mandley* v. *Trainor*, 523 F.2d 415, 420 (7th Cir. 1975), it does not permit them to extend benefits to certain "needy families" while denying "such benefits for some on AFDC welfare who have the same emergency need." *Lynch* v. *Philbrook, supra*, 550 F.2d at 796. Since the classification under attack limits its automatic denial of emergency assistance in the form of cash only to those applicants eligible for AFDC, this court need not determine whether the state could permissibly deny cash emergency assistance to *all* families applying for it. It is sufficient to note that the denial of cash assistance to those receiving or eligible for AFDC discriminates against an applicant on the basis of a status that is irrelevant to his or her need and offends the legislative intent to assure emergency assistance for all needy families, whether or not AFDC eligible. *See Lynch* v. *Philbrook, supra*, 550 F.2d at 796; *Mandley* v. *Trainor, supra*, 523 F.2d 421; *Ingerson* v. *Sharp*, 423 F. Supp. 139, 143-144 (D. Mass. 1976).

§350-j(2)(e)—Denial of Emergency Assistance in All Cases of Loss, Theft or Mismanagement of a Public Assistance Grant.

Plaintiffs Bacon, Goodwine and Parrish were all refused emergency assistance on the ground that the amended state statute mandates an automatic denial of emergency assistance in all cases where the emergency circumstances result from loss or theft of a public assistance grant. NYSSL §350-j(2)(e), as amended. The court concludes

that this provision constitutes an invalid restriction as to the type of emergency for which assistance has been provided under 42 U.S.C. §606(e) and impermissibly burdens recipients of public assistance alone, thus violating the Social Security Act. No opinion is expressed concerning the validity of the provision of NYSSL §350-j(2)(e) which precludes emergency assistance in cases of mismanagement of public assistance grants, since that provision is not presently in issue.[12]

As noted above, the Court of Appeals for the Second Circuit recognizes that " a state's definition of an emergency may not be more restrictive than that provided by the [Social Security] Act." *Hagans* v. *Berger*, 536 F.2d 525, 532 (2d Cir. 1976). It cannot be doubted that NYSSL §350-j(2)(e), as amended, restricts the eligibility standards established by the federal statute through its automatic prohibition of emergency assistance to genuinely needy families whose need is caused by loss or theft of welfare assistance funds. It is plain from a reading of the 1977 amendment that applicants whose emergency circumstances were caused by loss or theft of funds other than public assistance moneys are not excluded from eligibility by §350-j(2)(e). This plainly imposes a discriminatory retriction on public assistance recipients based on status, not need, and constricts the application of the emergency assistance eligibility provisions of the Social Security Act in

12. None of the named plaintiffs was denied emergency assistance on the ground that her emergency situation resulted from the "mismanagement" of a regular public assistance grant, as provided for in §350-j(e)(2), as amended. Consequently, none has standing to challenge that element of §350-j(e)(2), and this court does not pass on its validity.

violation of Congressional intent and the language of the Act. As stated above, the federal legislation does not allow the extension of benefits to select needy families while prohibiting "such benefits for some on [public] welfare who have the same emergency need." *Lynch* v. *Philbrook, supra,* 550 F.2d at 796.

In addition, it appears that welfare recipients whose emergency is occasioned by something other than loss or theft of their grant, *e.g.*, late mail delivery of an assistance check, or destruction of funds or goods by natural disaster, would be unaffected by NYSSL §350-j(2)(e), as amended, and would be eligible for emergency assistance. This section's restriction addressed to the cause of the underlying emergency contributes to the invalidity of the provision, for it precludes emergency assistance in all cases of particular types of catastrophes (loss or theft of welfare payments) without concern for the existence of genuine and demonstrable need on the part of the applicant. In *Williams* v. *Wohlgemuth,* 540 F.2d 163 (3rd Cir. 1976), Pennsylvania regulations which restricted emergency assistance to cases of natural disaster and civil disorder were invalidated under the supremacy clause because they constituted "eligibility standards more confining than those contained in the federal statute." *Id.*, at 169. Similarly, Illinois provisions which conditioned eligibility for emergency assistance on narrowly limited types of crises (primarily involving loss of habitable shelter) were held to be improper restrictions of the eligibility requirements of 42 U.S.C. §606(e) and thus void under the supremacy clause

in *Mandley* v. *Trainor*, 523 F.2d 415 (7th Cir. 1975). *See also Burrell* v. *Norton*, 381 F. Supp. 339 (D. Conn. 1974) (three-judge court; state regulations providing for emergency relief only in cases of natural disasters held unconstitutional as violative of the equal protection clause).

The absolute prohibition established by NYSSL §350-j (2)(e) plainly ignores the possibility that an individual applicant who is rendered ineligible by that statutory section due to his status or emergency may be in real and present danger of destitution. This court accordingly concludes that the state's blanket denial of all emergency assistance in every case involving the theft or loss of public assistance funds both discriminates against a protected class of applicants and improperly conditions eligibility on the nature of the claimed emergency. NYSSL §350-j (2)(e), as amended, improperly narrows the federal statutory mandate to furnish "emergency assistance to needy families with children," 42 U.S.C. §606(e), *see Lynch* v. *Philbrook, supra*, 550 F.2d at 795,[13] by automatically excluding from eligibility applicants whose destitution may

13. In *Hagans* v. *Berger*, 536 F.2d 525 (2d Cir. 1976), the Court observed in dictum that the emergency assistance provisions of 42 U.S.C. §606(e) would not require a participating state to provide delinquent rent for the recipient's present abode in lieu of relocation to some other shelter such as a welfare hotel. *Id.* at 532. This observation, which addresses only the form of relief the state might properly provide in emergency situations, in no way contradicts this court's present holding that the state's absolute denial of *any* form of emergency assistance in situations resulting from loss or theft of a public assistance grant is an impermissible narrowing of the federal eligibility standards.

be imminent and genuine and who thus are clearly eligible under the Social Security Act.[14]

§350-j(2)(f)—Denial of emergency assistance to replace or duplicate a recurring public assistance grant.

The 1977 amendment to §350-j also requires the categorical denial of emergency assistance when requested "to replace or duplicate a public assistance grant already made under section one hundred thirty-one-a" of the New York Social Services Law.[15] §350-j(2)(f), as amended. For essentially the same reasons that §§350-j(2)(c) and the

14. The Court of Appeals of New York State reached an identical conclusion in construing state regulations and state law in *Jones* v. *Berman*, 37 N.Y.2d 42, 371 N.Y.S.2d 422 (1975), which was decided well before the 1977 amendment to §350-j of the New York Social Security Law, at a time when the eligibility provisions of the state emergency assistance statute were substantially identical to those of the Social Security Act. *See* p. 10, *supra*. The Court in *Jones* held invalid a regulation of the New York State Department of Social Services which denied emergency assistance "when destitution is due to loss, theft or diversion of a grant already made." 18 N.Y.C.R.R. §372.2(c) (1969) quoted in *Jones*, *supra*, 37 N.Y.2d at 52, 371 N.Y.S.2d at 428. This regulation was held to restrict the eligibility provisions of the *state* legislation because it required "the summary denial of assistance without regard to the honesty of the loss or the actual destitute circumstances of the people intended to be protected by the act." *Id.*, 37 N.Y.2d at 52-53. The Court noted in dictum that the defective regulation thus added a requirement not existing under federal law, *id.*, at 53, although the Court did not reach the issue of whether the regulation was invalid under federal law due to its conclusion that it violated state statutory eligibility conditions. The 1977 amendment to §350-j may have cured the state law deficiency found in *Jones* v. *Berman*, but its legitimacy under the Social Security Act is an issue of federal law and, as held *supra*, the statute must be declared invalid.

15. NYSSL Section 131-a establishes the state's standard of need for basic monthly public assistance grants and allowances, and sets the level of those payments. *See Baumes* v. *Lavine*, 38 N.Y.2d 296, 300-302, 379 N.Y.S.2d 760, 763-765 (1975).

provisions relating to loss or theft in 350-j(2)(e) of the Social Services Law, as amended, have been held invalid above, this court holds that §350-j(2)(f) constitutes an unauthorized and improper limitation on eligibility for emergency assistance by the state, and therefore cannot stand.

As does each of the other invalidated provisions of the 1977 amendment to §350-j, this subsection mechanically and without exception disqualifies an applicant from consideration for full emergency assistance due to his or her status as a recipient of public assistance and without reference to the existence of genuine and immediate need. It appears to be applicable in all cases to which §350-j(2)(e) would apply as discussed above, and may be used interchangeably with it.[16] NYSSL §350-j(2)(f), as amended, is thus simply another statutory means for effecting a blanket denial of emergency relief to children already receiving public assistance when their imminent destitution is caused by the loss, or requires the replacement, of publicly furnished monies. As was noted in *Lynch* v. *Philbrook, supra,* 550 F.2d at 795-796, to automatically forclose emergency relief to any welfare recipient in this manner "seems an odd way of carrying out the 1968 mandate of providing 'emergency assistance to needy families with children.' "

In summary, the fatal defect in each of the challenged provisions of NYSSL §350-j, as amended, is its automatic and categorical exclusion of AFDC or other public assist-

16. For example, the denials received by plaintiffs Bacon and Goodwine from Westchester Social Services expressly referred both to the "loss or theft" provision of NYSSL §350-j(2)(e) and to the "duplication of public assistance" provision of 350-j(2)(f). *See* footnotes 2 and 3, *supra.*

ance beneficiaries from eligibility for full and unrestricted emergency assistance. The flat declaration of ineligibility based on an applicant's status at AFDC or other public welfare recipient means that such applicants, without exception, cannot even be considered for emergency assistance. These applicants are automatically disqualified without regard to the particular factual circumstances and *bona fides* of each application, including the honesty of the application, the actual gravity of the claimed emergency, or the actual imminence of the claimed destitution. The statute leaves no room for case-by-case review of individual applications to distinguish the improper claims from the deserving. Although New York plainly has a legitimate interest in insuring that its public assistance funds are not abused by fraudulent applications for emergency assistance, it may not legitimately protect that interest by automatically prohibiting such assistance to an entire class of needy applicants who are eligible for consideration under federal law. This categorical disqualification must inevitably brush aside genuinely deserving and federally eligible applicants in its broad sweep. As discussed at length above, such a restriction impermissibly narrows the eligibility standards established by 42 U.S.C. §606(e) and consequently is invalid under the supremacy clause of the constitution.

In so holding, it should be made clear that this court makes no determination concerning the individual merits of any particular applicant for emergency assistance.[17]

17. As earlier noted, the temporary restraining orders previously issued in this case merely required that defendants consider the merits of each plaintiff's application for emergency assistance without reference to the challenged amendment to NYSSL §350-j.

The court here simply declares that NYSSL §§350-j(2)(c), 350-j(2)(e) to the extent that it precludes eligibility for emergency assistance in cases of loss or theft of a public assistance grant,[18] and 350-j(2)(f) are inconsistent with and violative of the Social Security Act, 42 U.S.C. §606(e). Accordingly, they are declared to be invalid and the defendants and their successors in office shall be enjoined from enforcing them.

Settle order on five days' notice.

/s/ Lee P. Gagliardi

U.S.D.J.

Dated: New York, New York
September 29, 1977.

18. See footnote 12, *supra*.

Summary Order of Affirmance, 580 F.2d 1044

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of May one thousand nine hundred and seventy-eight.

Present:

HONORABLE WILFRED FEINBERG
HONORABLE THOMAS J. MESKILL
Circuit Judges
HONORABLE EDMUND PORT
District Judge

77-7567

JEANNE BACON, *et al.*,
Plaintiffs-Appellees,

against

PHILIP L. TOIA,
Defendant-Appellant,

CHARLES W. BATES,
Defendant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Summary Order of Affirmance

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

This is an appeal from a decision by Judge Gagliardi of the United States District Court for the Southern District of New York, certifying as a class under Fed. R. Civ. P. 23(b)(2) New York residents with needy children under 21 who have been or may be denied requests for emergency assistance due to appellant's enforcement of certain provisions of New York Social Services Law § 350-j, and granting declaratory and injunctive relief with respect to those provisions. The arguments appellant raises concerning the district court's jurisdiction and grant of class certification are identical to those rejected by this court under closely analogous circumstances in Greklek v. Toia, 565 F.2d 1259 (2d Cir. 1977), application for cert. filed sub nom. Blum v. Toomey, 46 U.S.L.W. 3556 (Mar. 7, 1978). On these issues and on the merits, we are in full accord with the analysis in Judge Gagliardi's opinion, 437 F. Supp. 1371 (S.D.N.Y. 1977).

The judgment of the district court is affirmed.

/s/ WILFRED FEINBERG

WILFRED FEINBERG

/s/ THOMAS J. MESKILL

THOMAS J. MESKILL
Circuit Judges

/s/ EDMUND PORT

EDMUND PORT
District Judge

Court of Appeals Order Remanding to District Court, August 21, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

77-7567

JEANNE BACON, *et al.*,
Plaintiffs-Appellees,

against

PHILIP L. TOIA,
Defendant-Appellant,

CHARLES W. BATES,
Defendant.

In an order dated May 11, 1978, we affirmed the decision of the district court for the reasons given in Judge Gagliardi's opinion, 437 F. Supp. 1371 (S.D.N.Y. 1977). Appellants timely moved for rehearing, arguing that an imminently anticipated Supreme Court decision might vindicate their position. That decision, Quern v. Mandley, 46 U.S.L.W. 4594 (June 6, 1978), was recently handed down, and we grant the motion for rehearing, recall our earlier order and vacate the judgment of the district court. Plaintiffs-appellees argue that the decision in *Quern* v. *Mandley* does not control the issues in this case, and defendant-

appellant disputes this claim. We express no view on which position is correct, and we remand the case to the district court to consider these contending agruments in the first instance, as well as the remaining issues in the case, if necessary.

/s/ WILFRED FEINBERG

WILFRED FEINBERG

/s/ THOMAS J. MESKILL

THOMAS J. MESKILL
Circuit Judges

/s/ EDMUND PORT

EDMUND PORT
District Judge

Dated: August 21, 1978

Notice of Motion for Summary Judgment (Defendant Toia)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavits of Robert S. Hammer, Esq., sworn to November 2, 1978 and John Hickey, sworn to October 31, 1978, the undersigned will move this Court at the United States Courthouse, Foley Square, New York, New York on November 14, 1978 at 4:00 o'clock in the afternoon on submission unless otherwise directed by the Court, for reconsideration of plaintiffs' motion for summary judgment, or, in the alternative, for an order pursuant to Fed. R. Civ. P. Rule 56 (b) granting summary judgment to defendants, and for such other

and further relief as to the Court may seem just and proper.

Dated: New York, New York
November 2, 1978

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant Toia

By ROBERT S. HAMMER

ROBERT S. HAMMER
Assistant Attorney General
Two World Trade Center
New York, New York 10047
Tel. No. 488-3394

To:

MARTIN A. SCHWARTZ, ESQ.
Westchester Legal
Services, Inc.
Atty. for Plaintiffs
95 Lincoln Avenue
New Rochelle, N.Y. 10801

DAVID N. BRANIN, ESQ.
County Attorney
Westchester County
Atty. for Defandant Bates
600 County Office Bldg.
148 Martine Avenue
White Plains, N.Y. 10601

Affidavit of John Hickey, October 31, 1978

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

State of New York)
County of Albany) ss.:

JOHN HICKEY, being duly sworn, deposes and says as follows:

1. I am the Director, Income Support Unit, Division of Income Maintenance, New York State Department of Social Services. As such, I am familiar with the circumstances which resulted in the 1977 amendment to Section 350-j of the Social Services Law that sets forth eligibility requirements for Emergency Assistance to needy families with children.

2. The intent of Section 350-j of the Social Services Law as enacted in 1968 was to take advantage of Federal funds to respond to emergency situations. The statute was not intended to serve as a supplement to the public assistance grant nor serve as an insurance policy in the event a public assistance grant was lost, stolen or mismanaged.

3. Accordingly, 18 NYCRR 372.2 was amended to prohibit the granting of emergency assistance when destitution was due to loss, theft or diversion of a grant already made. A copy of the amended regulation was duly submitted to the Department of Health, Education and Welfare for their approval and was duly approved on May

22 1973. A copy of transmittal Number 73-6 containing the approval is attached hereto as Exhibit "A". Attached hereto as Exhibit "B" is a copy of a letter dated Nov. 14, 1974 from Assistant Regional Attorney Annette Blum advising Deputy Commisioner Felix Infausto that "the replacement of stolen cash is optional".

4. The New York State Court of Appeals thereafter, in the case of *Jones* v. *Berman*, 37 NY 2d 42 (1975), held that this regulation was not authorized by Section 350-j of the Social Services Law.

5. The New York Legislature was concerned about the impact of the *Jones* decision since conceivably any family with children facing a risk of destitution would possibly be entitled to some assistance under that decision even though that family had previously received a grant of public assistance. The possible Legislative avenues of approach would be to repeal Section 350-j of the Social Services Law, or limit the amount of assistance that could be provided a particular family. Neither approach appeared attractive, thus, the Legislature amended Social Services Law 350-j to "override" the *Jones* decision and to accomplish by statute what the Department had done by regulation.

6. The Legislature was particularly concerned that public assistance recipients would exploit the *Jones* decision to seek replacement of lost or stolen cash since it is impossible to verify a claim that cash has been lost or stolen. Replacement of public assistance grants in such circumstances would be costly and would discourage recipients from becoming self-reliant.

Affidavit of John Hickey

7. It must be noted that Social Services Law 350-j does *not* discriminate against Aid-for-Dependent-Children recipients. The statute prohibits replacement of *any* public assistance grant that is lost, stolen or mismanaged. This applies equally to Home Relief and Aid-to-Dependent-Children recipients. The statute does prohibit emergency assistance in the form of cash to Aid-for-Dependent-Children recipients. However, the *only* occasions in which emergency assistance in the form of cash would be provided to a Home Relief recipient would be for those situations in which an Aid-for-Dependent-Children recipient would be eligible for a cash grant as part of the Aid-for-Dependent-Children program. Examples of these situations are set forth in Section 131-a of the Social Services Law such as replacement of furniture and clothing as a result of fire, flood or other like catastrophe. Since cash assistance is provided to *all* public assistance recipients in identical circumstances, there is no discrimination because the source of the cash assistance program is irrelevant to the recipient.

8. Furthermore, Section 133 of the Social Services Law authorizes temporary preinvestigation grants to *all* public assistance applicants who are in immediate need. Again, there is no discrimination in treatment of Aid-for-Dependent-Children applicants as opposed to applicants for Home Relief.

/s/ JOHN HICKEY

JOHN HICKEY

(Jurat omitted in printing.)

Exhibit A Annexed to Affidavit of John Hickey

Transmittal Number 73-6

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

Submit 6 Copies

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

To: Regional Commissioner
Social and Rehabilitation Service
Department of Health, Education, & Welfare

Transmittal Number:
73-6

I Program Identification (*Same identification as title page of preprinted plan*):
All Federal Programs

II Type of Action Submitted for Approval (*Check one and enter effective date*):
☐ New State Plan
☒ Amendment

Effective Date:
November 1972

Complete Remainder of Part II if this is an Amendment (*Separate transmittal for each amendment*)

Federal Regulation Citation:
I

Number of the Plan Section on Attachment:
As Indicated

Number of the Superseded Plan Section or Attachment:
As Indicated

Subject of Amendment:
Official Compilation Codes, Rules, and Regulations of the State of New York, Title 18—Supplement No. 11, November 1972

Exhibit A Annexed to Affidavit of John Hickey

III Governor's Review (*Check one*)

☐ Governor's Office Reported No Comment
☐ Comments of Governor's Office Enclosed
☒ No Reply Received Within 45 days of Submittal to Governor's Office

Signature of State Agency Official:
/s/ Abe Lavine

Title:
Commisisoner

Date:
February 13, 1973

Return to:
(*Name and Address of State Agency*)

NYS Department of Social Services
1450 Western Avenue
Albany, New York 12203

REPORT OF SRS APPROVAL

Date Received in Original Office:
2/22/73

Region:
II

Plan approved—one copy attached

Signature of Regional Official:
(illegible)

Title:
Regional Commissioner

Date:
5/22/73

Remarks:
With the exception of Section 385.1 items (1), (2), (3), and (4) and Section 385.7 (a) (i). See Letter dated 5/22/73 to Commissioner Lavine.

Exhibit A Annexed to Affidavit of John Hickey

PART 372

EMERGENCY ASSISTANCE TO NEEDY FAMILIES WITH CHILDREN

(Statutory authority: Social Services Law §§ 20, 34)

Sec.		Sec.	
372.1	Emergency assistance	372.4	Scope of assistance
372.2	Eligibility	372.5	Application
372.3	Repealed	372.6	Authorization

Historical Note

Part (§§ 372.1-372-5) added, filed July 26, 1965; repealed, filed Mar. 31, 1966; new (§§ 372.1-272.6) added, filed July 2, 1968 to be eff. July 1, 1968.

Section 372.1 Emergency assistance. Emergency assistance means all aid, care and services authorized during one period of 30 consecutive days in any 12 consecutive months to or on behalf of an eligible needy child and any other eligible member of the household, including the households of migrant workers with families in the State.

Historical Note

Sec. added, filed July 26, 1965; repealed, filed Mar. 31, 1966; new added, filed July 2, 1968; repealed, new added, filed Mar. 1, 1972 eff. immediately.

372.2. Eligibility. (a) Emergency assistance shall be provided immediately by a social services district to or on behalf of a needy child under the age of 21 and any other member of the household in which he is living if:

(1) Such child is (or, within six months prior to the month in which such assistance is requested, has been) living with any of the relatives specified in sec-

tion 80.1 in a place of residence maintained by one or more of such relatives as his or their own home;

(2) Such child is without resources immediately accessible to meet his needs;

(3) The emergency assistance is necessary to avoid destitution of such child or to provide living arrangements for him in a home; and

(4) His destitution or need for living arrangements did not arise because he or such relative refused without good cause to accept employment or training for employment.

(b) The grants and allowances provided under this section shall be for such items of need as may be only provided for in accordance with Part 352 of department regulations.

(c) Emergency assistance shall not be provided when destitution is due to loss, theft, or diversion of a grant already made.

(d) The availability of such emergency assistance shall not relieve a town social services official in districts with a county-town form of administration from providing home relief and care as may be necessary in emergency situations pursuant to subdivision 3 of section 67 of the Social Services Law.

Historical Note

Sec. added, filed July 26, 1965; repealed, filed Mar. 31, 1966; new added, filed July 2, 1968; amd. filed Jan. 13, 1970; repealed, new added, filed July 21, 1971; amd. filed Mar. 1, 1972 eff. immediately. Substituted new (a) and (c).

(Case annotations omitted in printing.)

Exhibit B Annexed to Affidavit of John Hickey

Letter Dated November 14, 1974

[Letterhead of]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Region II
Federal Building
26 Federal Plaza
New York, New York 10007

Office of the
Regional Director

November 14, 1974

Our Reference: GC:RA:II:AB

Mr. Felix Infausto
Deputy Commissioner
Division for Legal Affairs
1450 Western Avenue
Albany, New York

Attention: David S. Kellogg

Dear Mr. Infausto:

This letter responds to your request for advice as to whether the replacement of stolen cash is mandatory or optional.

45 CFR 233.120 provides that a State must specify the eligibility conditions imposed for the receipt of emergency assistance. The establishment of these specific conditions is within the purview of the State and therefore the replacement of stolen cash is optional.

Exhibit B Annexed to Affidavit of John Hickey

We would appreciate your keeping us informed and forwarding to us copies of any State court opinions.

If we can be of further assistance please contact the undersigned at (212) 264-3822.

Sincerely yours,

BORGE VARMER
Regional Attorney

By: /s/ ANNETTE BLUM
Assisistant Regional Attorney

Letter from Attorney General, January 17, 1979 with HEW Action Transmittal SSA-AT-78-44

[LETTERHEAD OF]

STATE OF NEW YORK
DEPARTMENT OF LAW

Two World Trade Center
New York, N.Y. 10047
Telephone: (212) 488-3394

ROBERT ABRAMS
Attorney General

January 17, 1979

Re: Bacon v. Toia
77 Civ. 2823 L.P.G.

Hon. Lee P. Gagliardi
U.S. District Judge
U.S. District Court
Southern District of New York
U.S. Courthouse—Foley Square
New York, New York 10007

Honorable Sir:

I submit herewith a copy of Action Transmittal SSA-AT-78-44 from the Department of Health Education and Welfare which analyzes the Supreme Court's decision in *Quern* v. *Mandley*, 436 U.S. 725 (1978) and gives HEW's views as to State Emergency Assistance plans.

Letter from Attorney General, January 17, 1979

As this may be of material assistance to the Court in determining our pending motion, I request that it be made part of the record.

Very truly yours,

ROBERT ABRAMS
Attorney General

BY: /s/ ROBERT S. HAMMER

ROBERT S. HAMMER
Assistant Attorney General

RSH:cl
Enc.

cc: Martin A. Schwartz, Esq.
Westchester Legal Services, Inc.
95 Lincoln Avenue
New Rochelle, New York
with enclosure

Exhibit Annexed to
Letter from Attorney General, January 17, 1979

DEPARTMENT OF HEALTH, EDCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
WASHINGTON, D.C. 20201

INTERPRETATION

ACTION TRANSMITTAL
SSA-AT-78-44 (OFA)

December 27, 1978

To:

STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PROGRAMS

SUBJECT:

Emergency Assistance to Needy Families with Children (EA)

REGULATORY AND STATUTORY REFERENCE:

45 CFR 233.120
406(e) of Title IV-A

PURPOSE:

This AT has three purposes:

1. **To inform you of the Supreme Court's Decision of June 6, 1978 in *Quern* v. *Mandley*;**
2. **To inform you that the injunction prohibiting HEW from approving State Plans for EA has been lifted; and,**
3. **To provide guidelines for approval of State EA plans.**

Exhibit Annexed to
Letter from Attorney General, January 17, 1979

Supreme Court Decision

On June 6, 1978, the Supreme Court ruled for the State and Federal Governments in the case of *Quern* v. *Mandley*, 436 U.S. 725, 98 SCt 2068 (1978). The Court held that States could limit eligibility for emergency assistance more narrowly than section 406(e) of the Act, which defines the permissable scope of programs for which Federal funding is available.

This decision supports the Department's policy of allowing States flexibility in the development of Emergency Assistance programs. It permits a State to define the types of emergencies it will cover and to limit the categories of needy families with children that can participate.

Lifting of Injunction

On December 11, 1978, the District Court lifted its injunction of November 29, 1976 issued in the *Mandley* case under which HEW was prohibited from approving any State Plans for Emergency Assistance that limited eligibility more narrowly than section 406(e) of the Act. The Department may now act upon pending and newly submitted Emergency Assistance amendments.

Guidelines for Plan Approvals

State plan requirements and conditions for federal financial participation as specified in 45 CFR 233.120, stand as written.

States remain free, under Federal policy to develop their own definition of the kind of emergencies they will meet under this program. The report of the House Ways and Means Committee

Exhibit Annexed to
Letter from Attorney General, January 17, 1979

of the 1967 Social Security Amendments, however, makes it clear that the intent of the Emergency Assistance program is to deal with crisis situations threatening an AFDC or other needy family. The Committee describes crisis situations such as "in evictions, or when utilities are turned off, or when an alcoholic parent leaves children without food."

— The State plan must clearly list the kinds of emergencies covered, and the kinds of assistance and services provided to meet the emergency needs.

— Eligibility must be based on an application. A determination must be made that the individual meets the conditions of eligibility for EA under the State Plan.

— A State Plan must clearly specify that AFDC recipients are included in its EA program. Other categories of needy families with children may be included at State option; these categories must be specified in the plan.

Monitoring

The Department will monitor State programs with periodic administrative revews.

EFFECTIVE:
Immediately

INQUIRIES:
Regional Commissioners

/s/ BARRY L. VAN LARE

Barry L. Van Lare
Associate Commissioner
for Family Assistance

Memorandum Decision of District Court, January 30, 1979

[Title Omitted in Printing.]

Gagliardi, D. J.

This action challenges the validity of the 1977 amendments to §350-j of the New York Social Services Law to the extent that they automatically deny Emergency Assistance to Needy Families with Children ("EA"): (1) in the form of cash to all families eligible for Aid to Families with Dependent Children ("AFDC") assistance; (2) in all cases of loss or theft of a public assistance grant; and (3) in all situations in which it is sought to replace or duplicate a recurring grant. The complaint alleges that these statutory provisions violate the federal eligibility requirements provided in 42 U.S.C. §606(e) and is therefore invalid under the Supremacy Clause of Article VI of the Constitution. The plaintiffs also contend that §350-j, as amended, violates the Due Process and Equal Protection Clauses of the Constitution.

By decision dated September 29, 1977, reported at 437 F. Supp. 1371 (1977), this court determined: (1) that it has pendent jurisdiction over plaintiffs' Supremacy Clause claim; (2) that plaintiffs could properly represent the class of persons who are residents of New York State, who are relatives of and reside with a needy child under the age of 21, and who have been or may be denied emergency assistance by virtue of the 1977 amendments to §350-j; and (3) that each of the amendments in question restricted eligibility for EA beyond the requirements set forth in 42

U.S.C. §606(e) in violation of the Supremacy Clause. This court declared the amendments to §350-j invalid and enjoined the defendant officials of the State Department of Social Services from enforcing them. By order dated May 11, 1978, the Court of Appeals for the Second Circuit affirmed this decision. On August 21, 1978, however, the Court of Appeals granted appellants' motion for rehearing in light of the recent Supreme Court decision in *Quern* v. *Mandley*, 436 U.S. 725 (1978). Expressing no view on the applicability of *Quern*, the Court of Appeals recalled its earlier order, vacated the judgment of this court and remanded the case for reconsideration of the Supremacy Clause claim in light of *Quern* as well as the remaining issues in the case, if necessary. Defendants have now moved for reconsideration of the previous decision or, in the alternative, for summary judgment. The motion for reconsideration is granted and defendants are granted summary judgment on the Supremacy Clause claim.

Quern involved a challenge to Illinois' EA program which limited eligibility to persons who were also eligible for AFDC and whose emergency need involved the loss of shelter due to damage or eviction. Plaintiffs contended, as in the instant case, that states were prohibited from defining eligibility more narrowly than 42 U.S.C. §606(e). After closely analyzing the statutory language and the legislative history, the Supreme Court rejected this contention and held that Congress did not intend to impose mandatory eligibility standards on the states that elect to participate in the EA program. 436 U.S. at 747.

Plaintiffs seek to distinguish *Quern* on the ground that Illinois, unlike New York, did not categorically exclude

AFDC recipients from receiving emergency assistance. As the Supreme Court stated, however, "there is no statutory language . . . that can reasonably be understood as imposing uniform standards of eligibility on every state EA program." 436 U.S. at 743. Because "EA is not a comprehensive system of income maintenance, but rather a program designed to allow quick, ad hoc responses to immediate needs," Congress intended to give to the states broad discretion in shaping their EA programs. *Id.* at 744-45. The broad definition of eligibility in 42 U.S.C. §606(e)—including virtually any family with needy children of a certain age that faces risk of destitution—"argues against the inference that Congress intended to require participating States to extend aid to *all* who were potentially eligible under [42 U.S.C. §606(e)]." *Id.* at 746 (emphasis in original). Thus, the Supreme Court expressly recognized that some states, like New York, "*exclude* AFDC recipients if the emergency need is one theoretically covered by the basic assistance grant. . ." *Id.* at 740 n.16 (emphasis in original). Although the New York statute was obviously not before the Court in *Quern*, this court can reach the result plaintiffs seek only by ignoring the Court's definitive statutory interpretation of 42 U.S.C. §606(e).[1] Accordingly, the defendants' motion for

1. Counsel has informed the court that the Department of Health, Education and Welfare has taken the view that, after *Quern*, state EA plans must at least specify that AFDC recipients are eligible for emergency assistance. HEW Action Transmittal SSA-AT-78-44, p. 3 (December 27, 1978). This court is obviously not bound by HEW's interpretation of 42 U.S.C. §606(e). "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214 (1976) (citation omitted).

reconsideration of this court's prior decision is granted, and on reconsideration, defendants' motion for summary judgment on the Supremacy Clause claim is granted.

Plaintiffs, however, also claim that §350-j, as amended, violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Consideration of these claims is clearly within the scope of the Court of Appeals remand order. This court's previous decision considered these constitutional claims only insofar as it determined that they were sufficiently substantial to confer subject matter jurisdiction under the rule of *Hagains* v. *Lavine,* 415 U.S. 528 (1974). The parties' memoranda, too, were principally addressed to the issue of whether *Hagans'* minimal standard of substantiality had been met. As such, the court has not had the benefit of briefs addressing the merits of plaintiffs' constitutional claims. Leave is thus granted to the parties to file memoranda of law addressing this issue within twenty days of the filing of this opinion.

In summary, the defendants' motion for reconsideration of the court's previous decision is granted and defendants' motion for summary judgment is granted as to the Supremacy Clause claim. Leave is granted to both parties to file memoranda addressing the merits of plaintiffs' Equal Protection and Due Process claims within twenty days of filing of this opinion.

So Ordered.

/s/ Lee P. Gagliardi

U.S.D.J.

Dated: New York, New York
January 30, 1979.

Memorandum of Law for Defendant Toia, February 7, 1979

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING.]

STATEMENT

This memorandum of law is submitted on behalf of defendant Toia in response to the Court's invitation in its memorandum of January 30, 1979, p. 5 to brief the constitutional issues raised in this case.

This is an action to enjoin the enforcement of New York Social Services Law, § 350-j, as amended, effective May 1, 1977, by Section 10 of Chapter 77 of the Laws of 1977. That section prohibits cash payments (but not services in kind) under the Emergency Assistance program when the emergency arises from the loss, theft or mismanagement of a regular public assistance grant. Plaintiffs based their challenge on an alleged conflict with the Social Security Act, 42 U.S.C. § 601 *et seq.* and the regulations promulgated thereunder, the Supremacy Clause of Article VI of the U.S. Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. As the Court notes in its memorandum of January 30, 1979, pp. 2-4 the pendent "Supremacy Clause" issue has been resolved by the Supreme Court in *Quern* v. *Mandley*, 436 U.S. 725 (1978), leaving the constitutional issues which it has heretofore addressed only in the context of substantiality sufficient to confer pendent jurisdiction as set forth in *Hagans* v. *Lavine*, 415 U.S. 528, 543-550 (1974).

ARGUMENT

THE STATUTORY EXCLUSION OF "EMERGENCIES" CAUSED BY LOSS, THEFT OR MISMANAGEMENT OF A REGULAR CASH GRANT CONFORMS TO THE CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

The Supreme Court, only a few weeks ago restated the well-established rule that

> "[S]ocial welfare legislation, by its very nature, involves drawing lines among categories of people, lines that necessarily are sometimes arbitrary. This Court has consistently upheld the constitutionality of such classifications in federal welfare legislation where a rational basis existed for Congress's choice.
>
> 'The basic principle that must govern an assessment of any contitutional challenge to a law providing for governmental payments of monetary benefits is well established. . . . In enacting legislation of this kind a government does not deny equal protection merely because the classifications made by its law are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.' *Dandridge* v. *Williams,* 397 U.S. 471, 485.
>
> 'To be sure, the standard by which legislation such as this must be judged is not a toothless one, *Mathews* v. *Lucas,* 427 U.S. 495, 510. But the challenged statute is entitled to a strong presumption of constitutionality.' *Mathews* v. *De Castro,* 429 U.S. 181, 185.
>
> See, e.g. *Califano* v. *Jobst,* 434 U.S. 47; *Califano* v. *Goldfarb,* 430 U.S. 199, 210; *Mathews* v. *Diaz,* 426 U.S.

67; *Weinberger* v. *Salfi*, 422 U.S. 749; *Jefferson* v. *Hackney*, 406 U.S. 534; *Richardson* v. *Belcher*, 404 U.S. 78.' "

Califano v. *Aznavorian*, —— U.S. ——; 47 U.S.L.W. 4307, 4039 (Dec. 12, 1978).

In the instant case, the legislative classification is supported by the recognized principle that the State may determine how it is to allot its social welfare budget, *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Maher* v. *Roe*, 432 U.S. 464, 497 (1977); *Ayers* v. *Whaley*, —— F. Supp. —— 76 Civ. 1499-WK (S.D.N.Y. 1977). Additionally, the Legislature was conscious of the administrative burden of weeding out fraudulent claims and wished to avoid that problem by entirely excluding the duplication of cash grants from the Emergency Assistance Program. *Matter of Jones* v. *Berman*, 37 N.Y. 2d 42, 52 (1975).

CONCLUSION

FINAL JUDGMENT IN FAVOR OF THE DEFENDANTS SHOULD BE GRANTED AND THE COMPLAINT SHOULD BE DISMISSED AS TO ALL CLAIMS RAISED THEREIN.

Dated: New York, New York
February 7, 1979

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant Toia

ROBERT S. HAMMER
Assistant Attorney General
Of Counsel

Letter from Plaintiffs' Counsel to District Court, April 29, 1980, with Attachment

[Letterhead Omitted in Printing.]

April 29, 1980

Hon. Lee P. Gagliardi
United States District Court
United States Courthouse
Foley Square
New York, N.Y. 10007

Re: *Bacon, et al.* v. *Toia, et ano.*

Dear Judge Gagliardi:

In response to the inquiry of your law clerk concerning the legislative intent of 18 N.Y.C.R.R. §372.2(c), plaintiffs are enclosing that portion of the State Commissioner's New York Court of Appeals Brief in *Matter of Jones* v. *Berman*, 37 N.Y.2d 42 (1975) entitled "The Rationale for §372.2(e) Is Clear."

Very truly yours,

/s/ Martin A. Schwartz

Martin A. Schwartz, Esq.

mas:mg

enclosure

cc: Hon. Robert Abrams
Attn: Robert Hammer, Esq.

Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of REBECCA JONES, on behalf of herself and her minor dependent children, and all others similarly situated,

Petitioners-Respondents-Cross-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

against

LEONARD BERMAN, in his capacity as Commissioner of the Department of Social Services of Westchester County and ABE LAVINE, in his capacity as Commissioner of the Department of Social Services of the State of New York,

Respondents-Appellants.

BRIEF FOR RESPONDENT-APPELLANT STATE COMMISSIONER

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent Lavine
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SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID R. SPIEGEL
Assistant Attorney General
of Counsel

placement of the stolen cash proceeds of a grant received from the New York City Department of Social Services. See also, analogously, *Copeland* v. *Saucier*, 475 F. 2d 1127 (5th Cir. 1973).

Petitioners are challenging an entirely proper exercise of regulatory authority. The remedy for § 372.2(c) is through legislative, not judicial redress. *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Snell* v. *Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), affd. 393 U.S. 323 (1969).

C. The Rationale for § 372.2(c) Is Clear

In a situation where a welfare recipient claims that the *cash* proceeds from her public assistance grant were lost or stolen, the Department has no tailormade evidentiary method for checking the truth or untruth of her (his) claims. Unlike the case of a lost or stolen *check*, there is no signature or endorsement to be studied. *Matter of Griffith* v. *Wyman*, 39 A D 2d 874 (1st Dept. 1972); *Matter of Collins* v. *Wyman*, 38 A D 2d 600 (2d Dept. 1972). Instead, the only proof of veracity may be inferential: police reports; witness statements, the applicant's reliability, as measured by her previous record.

Because there is no quick "test", the potential for massive, wholesale fraud is obvious. If there were no limitation on replacement of allegedly lost or stolen cash proceeds of welfare grants, *any* public assistance recipient who had experienced budgetary difficulties could fake the disappearance of a grant and then demand replacement.

Indeed, the claim of one of the two named parties in the *Domine* case plainly illustrates this potential problem. She came into the local welfare office 5 days prior to the time her next semi-monthly grant was denied and alleging merely that she had run out of money, demanded emergency assistance (*infra*, p. 25). Moreover, in the present matter, since Ms. Jones had received special grants on at

least two separate occasions prior to the alleged theft, there is clearly a possibility that her naked allegation of a crime was spurious.

In any event, in spite of the proscription against emergency assistance contained in § 372.2(c), a claimant in Ms. Jones' position is clearly not without a remedy.

As the facts of this case indicate, a request for replacement of lost cash will be treated as a request for duplication of a grant rather than as a request for emergency assistance and as such it falls within the discretionary authority of the local agency, pursuant to the Social Services Department regulation found in 18 N.Y.C.R.R. § 352-2(c). Acting pursuant to this provision, local officials in the present case initially replaced approximately two-thirds of Ms. Jones allegedly stolen grant.

Moreover, in the final analysis, it should be noted that petitioner and all those similarly situated to her, who have been denied full replacement of allegedly lost or stolen wel-

fare assistance, can request a state fair hearing and within 60 days* obtain an adjudication of their grievances, pursuant to 18 N.Y.C.R.R. 358.18 (The effect of the lower cour hearing on state administrative procedure is considered, *infra*, in Point II). This, the present petitioner refused to do, choosing instead to initiate the present proceeding.

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* According to the federal regulations effective October 15, 1973, this time period has been extended to 90 days [See, in particular, 45 C.F.R. § 205.10(a)(16)].

Letter from Attorney General, April 23, 1977, Enclosing Governor's Bill Jacket for Ch. 77, L. 1977

[LETTERHEAD OMITTED IN PRINTING.]

April 23, 1980

Re: *Bacon* v. *Toia*
77 Civ. 2823 LPG

Hon. Lee P. Gagliardi
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Honorable Sir:

Pursuant to your request for legislative history concerning Chapter 77, New York Laws 1977, I am enclosing a copy of the Governor's bill jacket obtained from the State Library.

The only references to the Emergency Assistance to Families program appear at page 5 of the Department of Social Service's memorandum and page 4 of what appears to be Division of the Budget's memorandum. No other legislative history appears to be extant.

Respectfully yours,

ROBERT S. HAMMER
Assistant Attorney General

RSH:dlg
Encls.

cc: Martin A. Schwartz, Esq.
Westchester Legal Services
95 Lincoln Avenue
New Rochelle, New York 10801

Governor's Bill Jacket

Chapter 77

Laws of 1977

S. 1347-A **A. 1647-A**

1977-1978 Regular Sessions

SENATE – ASSEMBLY

January 18, 1977

IN SENATE—A BUDGET BILL submitted by the Governor pursuant to article seven of the Constitution—read twice and ordered printed, and when printed to be committed to the Committee on Finance—committee discharged, bill amended, order reprinted as amended and recommitted to said committee

IN ASSEMBLY—A BUDGET BILL submitted pursuant to article seven of the Constitution—read once and referred to the Committee on Ways and Means—committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the social services law and the public health law, in relation to controls of expenditures under the medical assistance program, public assistance program, the home relief program and repealing certain provisions of the social services law relating thereto

Date Received By Governor:
MAR 31 1977

Action Must Be Taken by:
APR 12 1977

Governor's Action:
APR 12 1977

Governor's Bill Jacket

MEMORANDUM

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
Form DSS-524 (Rev. 11/68)
Formerly BOA-100

TO: Executive Staff
FROM: Frank E. Bogardus FEB

DATE: April 6, 1977

SUBJECT: 1977 Budget Bill Relating to Public Assistance and Medical Assistance

Outlined below are summaries of the provisions of the 1977 Budget Bill changing various aspects of the medical assistance and public assistance programs, as passed by the legislature on Thursday, March 31, 1977. The sections are arranged in the order in which they will become effective and are grouped according to whether they effect Income Maintenance or Medical Assistance Programs.

The following provisions of the bill will be effective as of April 1, 1977 once the bill has been signed:

INCOME MAINTENANCE.

• *Section 2: Maximum Increase in Shelter Allowances.* This provision establishes the maximum permissible increase in individual's or household's monthly shelter allowance at $10 for a family of four with $1 variations for each size household above and below that level, for the period April 1, 1977 through March 31, 1978. The total monthly allowable increase is an *aggregate* increase, i.e., an individual or household could receive more than one increase

during the one year period so long as the total does not exceed the maximum monthly increase for that size household. Any person first receiving the shelter allowance after April 1, 1975 could be eligible for the increase; however, persons first receiving a shelter allowance after July 1, 1977 will have the minimum allowable rent increase for which he can qualify taking into account any rent increases for which he was charged in the three month period prior to the period for which he first received a shelter allowance. The purpose of this particular rule is to prevent collusion between a landlord and a tenant who is about to become a public assistance recipient. A person who is receiving assistance and who becomes ineligible for a period of 90 days or less will be treated for purposes of computing his qualification for an increased shelter allowance as if he had been continuously eligible for assistance.

The section also provides that any landlord or recipient may apply to the department for an exemption from the limitations on increases, on the basis of factors to be established by department regulations.

Implementation of this section will require immediate notification to Social Services Districts, and changes in the department regulations and the ADC State plan.

• *Section 3: Elimination of Aid to Illegal Aliens.* This provision would prohibit the granting of Aid to Dependent Children, Home Relief or Medical Assistance to persons who fail to furnish evidence that they are lawfully residing in the United States by eliminating the current provision authorizing aid to be provided for a temporary period of 30 days. The provision is effective as of April 1 with

respect to new applicants, and as of May 1 with respect to persons who are currently receiving duplicate assistance.

Implementation of this provision will require immediate notification to Social Services Districts and changes in department regulations.

• *Section 4: Bonus for Low ADC Ineligibility Rate.* This provision authorizes the payment of a "bonus" to those districts determined to have a rate of incorrect eligibility determinations in the ADC Program of less than 5 per cent as of the period April 1, 1977 through September 1, 1977. The district must be paid prior to December 31, 1977. The amount of the bonus is to be 20 per cent of the state share of reimbursement for home relief received during the State fiscal year 1976-1977.

Implementation of this provision will require changes in department regulations, notification to local Social Services Districts and a state-wide audit of ADC eligibility rates.

• *Section 5: Pursuit of SSI Eligibility.* This provision requires that when a home relief applicant is determined ineligible for SSI, he must as a condition of continued eligibility appeal the denial and exhaust his administrative remedies. Home relief eligibility continues pending the appeal.

Implementation of this provision will require immediate notification to the Social Services Districts and changes in department regulations.

• *Section 6: State-Wide Child Support Collections Goals.* This provision would authorize a district-by-district allotment of a state-wide child support collection

goal to be established by the Legislature as part of the Local Assistance appropriation. Any district determined by the department to have failed to meet its portion of the collection goal will have withheld from state reimbursement an amount equal to the difference between the state share of support actually collected and the state share of the district's child support collection goal. Districts may request from the Commissioner a re-determination of any decision to withhold state reimbursement; the Commissioner shall, upon a showing that the failure to meet the districts collection goal is attributable to factors beyond the control of the local legislative body, waive such failure in whole or in part. Provisions are made for computation of amounts attributable to the collection goal.

The amount of six million dollars has been established as the state-wide child support collection goal for this fiscal year.

This provision is effective April 1, 1977 and remains in effect only through June 30, 1978. This particular expiration date is based on an assumption that the child support program, which under current law will expire June 30, 1977, will be extended for an additional one year period.

Implementation of this provision will require notification to Social Services Districts, changes in department regulations and possible amendments to the IV-A and or IV-D State plans.

• *Section 7: Standard for Home Relief Vendor Restricted Payments.* This provision deletes the requirement that a determination to authorize restricted payments be

made on an individual case basis, and clarifies situations in which such payments may be made.

The stated purpose of this provision is to conserve funds by expanding district use of vendor restricted payments in the Home Relief program.

Implementation of this provision will require notification to Social Services Districts, and changes in department regulations.

• *Section 28: Local Administrative Productivity Reports.* This provision requires the department to submit a report to the legislature and the Governor by January 1, 1978 on local administrative productivity in income maintenance programs, including a plan approved by the Director of the Budget to effectively control administrative costs in IM programs. The report is to be updated on a quarterly basis.

Implementation of this section may require additional reports from local districts in order to obtain staff and workload information.

MEDICAL ASSISTANCE.

• *Section 19: Contract Rates with Voluntary Clinics.* This section prohibits payment for any hospital out-patient and emergency services, or for treatment or diagnostic services, under contract with voluntary non-profit agencies, unless the Health Commissioner determines that costs incurred for the services are approvable under the reasonable cost provisions applicable to rates for hospitals and clinics under Public Health Law Section 2807.

No implementation is required by this department.

Governor's Bill Jacket

• *Section 20: Clinic Rates.* This provision continues the freeze on clinic rates at calendar 1975 levels through December 31, 1977, and in addition establishes a $50 maximum rate, with authority of the Health Commissioner to waive the maximum where a higher rate is warranted by a specialized service provided by the clinic. The language establishing the criteria for waivers is intended to allow higher rates for clinics performing uncomplicated surgery on an out-patient basis, providing kidney dialysis treatment, and providing "surgical procedures where delay in surgery intervention would substantially increase the medical risk associated with such surgical intervention."

Implementation of this section would require notification to Social Services Districts of clinic rates as they are approved by the Division of the Budget.

• *Section 21: Continuation of RCHF Rates.* This section authorizes the Health Commissioner to compute rates for the April 1, 1977 through December 31, 1977 rate period based on the grading system established in Public Health Law 2803 and the prudent buyer concept established in Public Health Law 2808. This section is effective retroactive to January 1, 1977. The purpose of the retroactive date is so that the continuation will have been effective as of the time the State Hospital Review and Planning Council established regulations governing the rate-setting methodology for the April 1, 1977 rates.

Because the April first rate period ends at the end of this calendar year, and because notice of any new rates for the period beginning January 1, 1978 must be given by

November 1, 1977, it will be necessary for the Legislature to take further action this session to establish the basis for determining rates for long term care after December 31, 1977.

Implementation of these provisions will require notification to Social Services Districts and changes in the State plan.

• *Section 22: Multi-level Medical Facility Operating Certificates.* This section would authorize the Commissioner of Health to modify the operating certificates of hospitals, skilled nursing facilities and intermediate care facilities to authorize two or more such levels of care within the same facility, and would extend the Health Commissioner's authority to suspend, limit or revoke the operating certificate of a medical facility, on the basis of need, to include skilled nursing facilities and intermediate care facilities. The procedure for suspension, limitation, modification or revocation would be the same as that established with respect to revocation of hospital operating certificates on the basis of need as established by Chapter 76 of the Laws of 1976, including notice and public hearing. The Commissioner of Health may not modify a medical facility operating certificate to include domicillary care beds, or to increase the total number of beds, or to remove a patient as a result of the certificate modification.

Implementation of this provision will require notification to Social Services Districts of multi-level care facilities as they are authorized by the Health Commissioner.

• *Section 23: Rates for Multi-level Facilities.* This provision requires the Health Commissioner to certify distinct rates of payment for each level of care within a multi-

level facility, with the rate period for any new level to be established upon 60 days prior notice.

Implementation of this provision will require notification to Social Services Districts of any new rates established by the Health Commissioner.

• *Section 24: Special Provision for Contract Rates.* This provision authorizes the Health Commissioner, in certifying rates to voluntary agencies for emergency and clinic services pursuant to contract, to take into consideration the economic status of the patients receiving such services. The purpose of this section is to authorize a higher rate for voluntary agencies providing these services in ghetto areas.

This provision should be read in conjunction with Section 19, above.

Sections 26 and 27: Waiver of Notice. These sections waive the requirement that 60 days prior notice be given for the promulgation of rates for the period beginning April 1, 1977.

• *Section 28: Local Administrative Productivity Reports.* This provision requires the Department to submit a report to the Legislature and the Governor by January 1, 1978 on local administrative productivity and income maintenance programs, including a plan approved by the Director of the Budget to effectively control administrative costs in IM programs. The report is to be updated on a quarterly basis.

Implementation of this section will probably require additional reporting from which to obtain staff and workload information from local districts.

Governor's Bill Jacket

The Following Provisions are Effective May 1, 1977:

INCOME MAINTENANCE.

• *Section 1. Prohibition Against Duplicate Assistance.* This section authorizes local districts to furnish duplicate assistance by prohibiting any mandate for duplicate assistance, and prohibits state reimbursement if duplicate assistance is granted, unless required by a court of competent jurisdiction.

This provision is intended as a conforming amendment necessary to fully set forth the State's policy with respect to emergency assistance to families, as outlined in Section 10 of the bill.

Necesary actions to implement this provision are the same as those outlined in Bill Section 10, below.

• *Section 8: Three Day Work Requirement.* This provision requires that home relief recipients assigned to public works projects be assigned an average of three days work per week regardless of the size of the budget deficit. An average of two days per week must remain available for required job search. Persons may be excused from work days to report to employment interviews or for reasons adopted under the prevailing personnel practice of the unit to which the person is assigned.

Implementation of this section will require notification to Social Services Districts and changes in department regulations.

It should be noted that during discussion of the bill the department committed itself to fully pursuing any administrative actions available to obtain HEW approval of a

public works program for ADC recipients, including the adoption of any legally defensible interpretation of current Social Services Law language requiring ADC recipients to work off their grants.

• *Section 9: State Reimbursement for Workmen's Compensation Coverage.* This section authorizes 100 per cent reimbursement for Social Services District's expenditures for workmen's compensation coverage for persons assigned to public works projects.

Implementation of this section requires notification to Social Services Districts and possible changes in department regulations.

• *Section 10: Emergency Assistance to Families.* This provision amends Section 350-j of the Social Services Law to provide that persons receiving ADC shall be ineligible for EAF except to the extent of emergency services, medical care provided as emergency assistance and emergency grants. In addition, EAF is limited, with respect to other family situations which threaten family stability or cause destitution, to situations that could not have been foreseen and were not under the control of the applicant and did not result from the loss, theft or mismanagement of a PA grant.

Implementation of this section will require changes in department regulations, notification to Social Services Districts and possible changes in the State plan.

MEDICAL ASSISTANCE.

• *Section 12: In-Patient Hospital Services.* This provision establishes authority for a utilization review

program required for long term care facilities, and authorizes the exclusion of the following types of care and services from the definition of in-patient hospital care: care provided on a Friday or Saturday when that Friday or Saturday was the date of admission to the hospital, unless such care was necessary because of an actual medical emergency or for pre-operative care, or unless the hospital has been determined by the Commissioner of Health to be providing a full level of services on a seven-day-a-week basis; and certain uncomplicated procedures which can be performed on an out-patient basis unless the Health Commissioner or his designee determines that the medical condition of the individual patient requires the procedure to be performed on an in-patient basis.

Implementation of this provision will require the establishment of a system for notifying Social Services Districts of those patient days which are authorized for payment as items of medical assistance.

• *Section 16: Authorization for Co-Payments.* This provision authorizes co-payments for medical and prosthetic appliances, supplies and equipment, dental care, eyeglasses and drugs, for persons 21 or over but under 62 years of age. The co-payment amount for drugs will be 50 cents for each separate claim and for the other specified items of care, services and supplies, the maximum amount authorized by federal regulations. Language was added to the end of the section making it clear that if HEW disapproves the distinction resulting from the exclusion of persons 62 years of age or older from the co-payment provision, the exclusion will become non-operative and all persons 21 or over will be required to pay the co-payment.

Governor's Bill Jacket

Implementation of this section will require notification to Social Services Districts, changes in department regulations and changes in the State plan.

• *Section 17: State Reimbursement for Co-Payment Items.* This provision makes it clear that state reimbursement will not be available for amounts representing co-payments for those items of care, services and supplies for which co-payments may be charged.

This section should be implemented with Bill Section 16.

• *Section 18: Prior Admission Review.* This provision would make it clear that the Commissioner of Health or his designee may conduct a patient evaluation to determine the appropriate level of care for a patient prior to his admission to a skilled nursing facility or an intermediate care facility.

Implementation of this section requires the development of a procedure to reject claims for care not authorized for payment by the Commissioner of Health or his designee.

The Following Provisions are Effective July 1, 1977:

• *Section 13: Establishment of a Drug List.* This provision limits the drugs for which medicaid reimbursement will be available to the following: (a) those non-prescription drugs included on a list established by the Health Commissioner; and (b) those prescription drugs contained on a list established by the Health Commissioner for which a recipient is charged or a claim is made at or below a maximum reimbursable amount established by Social Services regulations.

Drugs which may be excluded from the prescription list include those which a medicaid recipient can purchase at low cost or which have low cost alternatives or which are "non-essential" as determined by the Health Commissioner.

It should be noted that the price list to be established pursuant to this section will be an exclusive list that will preclude Social Services Districts from paying greater amounts on a local option basis.

Implementation of this section will require the development of a list of prescription drugs and a price list, and notification to Social Services Districts of those lists.

• *Section 14: Limitation of Optional Services.* This provision limits optional services available under the medical assistance program by requiring that care and services of physical therapists, occupational therapists and speech pathologists, and supplies relating thereto, can be provided only at the direction of a physician, and by eliminating the care and services of podiatrists and chiropractors and supplies relating thereto, and care and services of private duty nurses furnished on an in-patient basis.

The stated purpose in the delay of the effective date of this provision to July 1, 1977 is to allow the Legislature time to reconsider the elimination of the services from the medical assistance program. A bill introduced in the Assembly (A.7516) by Mr. Hevesi would reinstate these services in the medical assistance program. The bill passed the assembly under a Message of Necessity from the Governor.

Implementation of this section will require notification to Social Services Districts, changes in department regulations and changes in the State plan.

MISCELLANEOUS PROVISIONS.

Bill Section 11, which would take effect May 1, 1977, repeals an obsolete provision of the EAF law relating to payment of aid continuing, and requires no action for implementation.

Bill Section 15, which takes effect April 1, 1977, deletes an obsolete reference to enrollment fees under the medical assistance program and requires no action for implication;

Bill Section 25, which takes effect April 1, 1978, reenacts the provision which currently requires recipients to work off their budget deficit under public works programs. This provision was repealed by Section 8 of the bill, which is effective only until March 31, 1978.

Bill Sections 29, 30 31 do not change substantive provision of law.

FEB:rj

Governor's Bill Jacket

[LETTERHEAD OF]

LAW OFFICES

TOBIN AND DEMPF
100 State Street
Albany, N. Y. 12207

March 10, 1977

Hon. John J. Marchi, Chairman
State Finance Committee
Room 913—Legislative Office Building

Hon. Arthur J. Kremer, Chairman
Assembly Ways and Means Committee
Room 923—Legislative Office Building
Albany, New York 11247

Re: S. 1347 Budget Bill
A. 1647 Budget Bill

Relating to Medical Assistance Program, Public Assistance Program and Home Relief Program

Gentlemen:

Our law firm is Legislative Counsel for the New York Association of Homes for the Aging. This Association represents approximately 125 non-profit, voluntary, residential Health Care Facilities in New York State. At the present time, approximately 40,000 elderly residents of the State of New York are patients in these non-profit, voluntary, residential Health Care Facilities in the State.

First, we are in general agreement with both Houses of the Legislature and the Governor's office that one must

accept the basic premise that the health costs must not be permitted to increase year after year without any controls placed thereon. While we admit this basic premise, we would also like to go on record and express an alarming concern with the steps that have been taken in the last two years, starting with the 1975 Legislature and continuing into the 1977 Legislature. That is, because of the State's need to focus its attention on the bottom line of medicaid expenditures in the State, there has been a general thrust by State government, through the Legislature, Department of Health and the Governor's office, in attempting to turn around a health care delivery system in the State. This system of care and especially in the voluntary sector had established a co-partnership with State government as a result of the Article 28A Financing Law which was passed by the 1966 Legislature. This co-partnership permitted the construction of approximately 100 non-profit, voluntary, residential health care facilities in the State.

Now that this co-partnership has been established and ayy of these facilities have been constructed with state mortgage financing, the State government wants to breach this relationship and, in turn, attempt to make drastic changes overnight on a system that has been in place for a number of years. It is our contention that this system cannot be turned around on such a short basis, without having a disruptive and injurious affect on the operation of these facilities. This is further compounded by the historical differentiation between a voluntary, non-profit facility and a proprietory facility. The voluntary, non-profit facility has, in the past, provided for a higher in-

tensity of care at a commensurate higher cost. The Legislature, in 1975, and in turn the Department of Health by regulation has narrowed this gap and is presently treating these facilities on the same plateau even though historically they have always been different.

We point out this background for purpose of illustrating that the effect of the Legislature and the Bill in question will have a more drastic effect on the voluntary, non-profit, residential care facilities. This in turn will cause a more drastic, and in some cases injurious, side effect on the patients and residents being cared for in voluntary, non-profit facilities.

It is also important to remember the particular make-up of the approximately 40,000 patients that we have in the voluntary, non-profit, residential care facilities. In many cases, 80% of the patients in one of our facilities are on Medicaid. This has two important side effects on the facility and the patient. The first, these patients are the aged, infirmed and poor elderly who are extremely vulnerable to the infirmities of age. As such and because the average age in our facilities is approximately 82 years old, these peoples needs are greater than the well elderly. In addition, since they have no resources they are absolutely and totally dependent upon the government to provide for their needs in these facilities. Because of the high ratio of Medicaid patients in the facilities, there is also a substantial dependence on Medicaid dollars for the operation of a budget of any of our facilities. As such and because of the drastic actions that have been taken in the last couple years, our facilities have no resources to provide a Medicaid patient with their needs if, in fact, government refuses to so

provide. Therefore, as an overview to our comments on this Bill, we must remind the Legislature that if government dosen't provide for the aged, infirmed and poor elderly, then they are left without any essential services.

Our first comments are addressed to Section 12 of the Bill which amends Section 365A of the Social Services Law. We are particularly concerned with the elimination of Medicaid coverage for dental care and coverage for podiatrists. First, concerning dental care, we would hope that this provision could be clarified so as not to prevent residents of residential care facilities in receiving dental care to preserve their teeth and that they not have to realize pain or suffering before such service can be provided. Secondly, with respect to podiatrist's care, we would recommend that there be an added clause which would permit such services if recommended under the direction of a physician. Again, the well elderly in our facilities have podiatry needs which must be met, and if not provided by Medicaid they will not receive such services. It would seem to us that providing for a physician's recommendation would prevent the many abuses which have taken place in respect to the provision of this service.

Section 15 of the Bill provides for a new subdivision 6 in Section 367A. This subdivision would provide for a co-payment to be made on behalf of the recipient for medical and prosthetic applicances, supplies and equipment, eyeglasses and dental care. We are aware that the maximum co-payment chargable to a recipient would be no more than $3.00 if the State's payment for services is $51.00 or more. Again, while this is a small amount of money for a co-payment, it should be remembered that their resources of a

person eligible for medical assistance are minimal or non-existent. Therefore, we would hope that exceptions will be made for those cases wherein the person doesn't have the money for the co-payment.

The most important provisions vis-a-vis residential health care facilities can be found in Section 19, which amends Section 2803 of the Public Health Law. Subparagraph f is the type of action which is being proposed which will attempt to turn around the long term care field in the shortest possible time. The main thrust of this section permits the Department of Health, which it is already doing by regulation, to request the DMS-1 forms for each and every patient in every long term care facility in the State of New York. First, we are in favor of the principle that a patient should be provided for in the appropriate level of care. However, in dealing with the well elderly it should be remembered that their needs change from day-to-day, and in some cases more frequently, so that it is very difficult to establish an arbitrary system which would state that a person is eligible for a certain level of care based upon his or her condition on one day, but not eligible for care in a different level based upon a changing condition the very next day. This in a sence [sic] is what can happen under the proposed system. Secondly, this Bill would be directed not only at the Medicaid patients but also at all self paid patients. This particular provision has to violate the constitutional rights of self paid patients to exercise their freedom of choice to be placed in a home of their choosing. In addition, this provision has a dual effect of hurting the Medicaid patients presently in a long term care facility. That is, since Medicaid does not cover all essential services, private patients are charged more in order to subsidize the

Medicaid patients. In this way, the Medicaid patient can also receive a full and complete level of care.

The second problem, and by all means another drastic consequence of such Legislation, is that this provision, as written, will also apply to all of those patients and residents presently in the facility. The moving of patients out of the facility in which they are presently residing has a harmful and deleterious effect on their health and well being and should be absolutely avoided unless they are required to go to hospitals in order to provide on a temporary basis health care which cannot be provided in the long term care setting. On this point, it also should be mentioned that if the patient is transferred temporarily to a hospital he or she should be permitted to return to the facility from whence they came. This Legislation in no way protects this principal and, in fact, such a patient could be relocated to another facility which would be harmful [illegible] aid patient.

Subdivision f also has a short coming with respect to its definition of terms. In the past few years, we have become extremely uncomfortable with the Department of Health's implimentation by regulation of Legislation. They have in the last couple of years implimented Legislation contrary to the clear legislative intent found in such laws. In this respect, we refer you to Assemblyman Alan Hevesi's frequent public remarks concerning this particular problem. Therefore, we would hope that the Legislature would more clearly define the terms utilized in this subdivision so that this Legislation, which will be passed by the Legislature, will clearly carry out the Legislative intent. For example, uniform criteria should be defined. Appropriate levels of care and lengths of stay should be defined. What is the

meaning of the following sentence: The facility shall provide such information, facilities and service as may be required by the Commissioner to impliment the provisions of this paragraph. Query, what is the meaning of the term facilities which appears between information and service?

One suggestion that we have concerning the regulations to be implimented by the Commissioner of Health would be to have such proposed regulations reviewed by the Legislature and its staff before they can be implimented. In this way, we would have assurances that the Legislative intent would, in fact, be carried out.

Subsection 22 which amends paragraph f of subdivision 2 of Section 2807 should be further amended. This subdivision mandated that the Commissioner of Health should establish the rates by reading into such rates the rating system and the Prudent Buyer concept. This has been misapplied by the Commissioner and has had a harmful effect on the voluntary, non-profit, long term care field. We would recommend that Assembly Hevesi's Bill, A. 3324, be read into this section by amending such section to include the changes that have been proposed on the Prudent Buyer concept.

The amendment to Section 2807, subdivision 3, which permits the reclassification of beds so that facilities are reimbursed at a different level of payment is the type of measure which we have mentioned above generally which causes chaos in any particular facility which is going to be subject to recertification of beds. That is, every one of these facilities must have a budget made up for the coming year and since they are dependent upon Medicaid for pay-

ment, they must also have assurances that the rules of the game being played with Medicaid are not changed during the year. This provision would cause the unnecessary firing and hiring of people, depending upon the change of the status of the bed on any particular day. We would suggest that an amendment be made to this section which would only permit certification of a bed annually, as long as a particular bed is filled by a person that fits the proper level of care at the time of admittance to the facility, regardless of the change of the person's condition thereafter during the year for which the rate has been established.

The last provision of the Bill that we would like to comment on particularly is subdivision 26 which permits the waiver of the 60 day notice requirement as mandated by Public Health Law Section 2807, subdivision 4. The Legislature should take note that for the last three years, we in the long term care field have not had the appropriate lead time notice before the rate has been established. This has not been the exception to the rule, but it has been the rule. Last year was the most drastic violation to date when the rate was finally established November 1, 1976, retroactive January 1, 1976. It is our understanding that the rate to be established on April 1, 1977 will not in fact be promulgated on that date, but hopefully it will be probably promulgated sometime during April, 1977. Needless to say, this type of procedure has a disruptive effect on facilities and prevents the preparation of a budget and also prevents any steps being taken concerning the hiring or firing of any person pending the establishment of these rates.

Governor's Bill Jacket

Finally, we believe that the specific comments which we've made concerning this Bill clearly illustrate that drastice steps have once again been proposed and will be imposed, if not amended, on the long term care field in the State of New York. We strongly believe that while the ever escalating health costs must be brought under control, we strongly object to the drastic short term measures that have been and are attempting to be forced on the long term care field, and particularly the not-for-profit, voluntary, residential care facilities in the State of New York. These facilities, in many cases, entered into a partnership with government over ten years ago with an understanding and trust that the well elderly in the State of New York would be cared for properly. We believe that this Bill is a breach of this trust and that if the long term care field must be changed, then it must be changed in an orderly fashion and not by a meat-axe approach. Therefore, we respectfully request that the appropriate amendments be made to this Budget Bill, as we have requested above.

Respectfully submitted,

NEW YORK ASSOCIATION OF
HOMES FOR THE AGING

By: /s/ JAMES W. SANDERSON

James W. Sanderson
Legislative Counsel

JWS:r

cc Hon. Judah Gribetz
Hon. David Burke
Hon. Warren M. Anderson
Hon. Manfred Ohrenstein
Hon. Stanley Steingut
Hon. Perry B. Duryea
Hon. Alan Hevesi
Hon. Tarky J. Lombardi, Jr.
Mr. Edward Clark
Mr. Philip C. Pinsky, Esq.
Mrs. Harriet Morse
Ms. Joanne C. Constantino

Governor's Bill Jacket

[LETTERHEAD OF]

COUNTY OF ORANGE
COUNTY LEGISLATURE
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VICTOR J. LUDMERER
Box 100
Warwick, New York 10990
LEGISLATOR
10th Legislative District

April 20, 1977

The Honorable Hugh L. Carey
Governor, State of New York
The Capital
Albany, New York

Dear Governor Carey,

This is to advise you that I support and urge you to support the Welfare-Medicaid reductions for fiscal year 1977-78 of 175 million dollars for local districts as a first step in welfare reform.

Your support of this piece of legislation will be greatly appreciated by the people of my District and myself.

Very truly yours,

/s/ VICTOR J. LUDMERER
Victor J. Ludmerer

VJL:ecf

Governor's Bill Jacket

TEN DAY BILL

BUDGET REPORT ON 10 AND 30 DAY BILLS

FORM B-201(a) Session Year 77

SENATE	Introduced by	ASSEMBLY
No. 1347-A	Budget	No. A.1647-A

Law: Social Services
Public Health

APR 7 1977

Subject and Purpose (Brief Recapitulation):

This bill proposes changes in the medical assistance, public assistance and home relief programs necessary to enact the Executive Budget.

Division of the Budget recommendation on the above bill:

Approve: X Veto: —— No Objection: ——
No Recommendation: ————

This bill is *identical to* ( ) *very similar to* (x)

Division of the Budget No. 42 which was submitted
(department or agency)

as a departmental proposal this year. The points made in our earlier analysis of the departmental proposal are still valid and our recommendation is unchanged.

(If the *very similar* category is checked, list below the changes contained in the bill as passed and discuss them to the required extent.)

Legislative changes made in S.1347-A were reviewed and approved by staff of the Division of the Budget, Health Department and Department of Social Services.

OK /s/ H. MILLER

Date: April 7, 1977 Examiner: /s/ ALEXANDER ROLLO
Alexander Rollo

Governor's Bill Jacket

[LETTERHEAD OF]

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

HAMILTON FISH, JR.
25th District, New York

April 15, 1977

The Honorable Hugh Carey
Governor
State of New York
Executive Office
Albany, New York

Dear Hugh:

I realize you are making every effort to reduce the size and balance the New York State budget for 1977-78, and as a part of this effort you have proposed legislation (S.1347/A.1647), and administrative changes, and have proposed amendments to the State Medicaid Plan on file with HEW which must be approved by HEW as the methodology of Medicaid reimbursement would change.

It is the contention of the Hospital Association of New York State that while these amendments would save the State $25.8 million, they would cost hospitals $346 million, with the result that the quality of health care available in New York State could suffer.

I respectfully request you reconsider the steps you have taken.

With every best wish, I am,

Sincerely,

/s/ HAM
Hamilton Fish, Jr.
Member of Congress

F:jt

Governor's Bill Jacket

MEMORANDUM IN SUPPORT OF

SENATE ASSEMBLY

A BUDGET BILL submitted by the Governor in accordance with Article VII of the Constitution

AN ACT to amend the social services law, the public health law and the education law, in relation to controls of expenditures under the medical assistance program, public assistance program, the home relief program and limitations on expenditures for social services and repealing certain provisions of the social services law relating thereto

Purpose of bill: This bill would amend the Social Services Law to reduce the maximum shelter allowance and basic grant for certain public assistance recipients; eliminate assistance to illegal aliens; limit the scope of the Emergency Assistance to Needy Families with Children program; and strengthen certain eligibility and payment processes. It would also further amend the Social Services Law and amend the Education Law to eliminate requirements for local social services districts to fund services beyond the level to match Federal Title XX funds; provide greater flexibility to localities for utilizing Title XX funds; and reduce the level of reimbursement for Union Free School Districts which are operated by child care agencies. The Social Services Law, the Public Health Law, and the Education Law would be amended to restructure the methodolo-

gies for reimbursing health care facilities; eliminate or restrict Medicaid coverage for certain services and drugs; require a copayment amount for certain services, supplies, and drugs; change income eligibility standards for Medicaid; better control placement of patients in long-term care facilities; and establish a formulary for the substitution of generic equivalents for trade name drugs.

Summary of Provisions of Bill:

A. *Income Maintenance*—Various sections of the Social Services Law would be amended to:

— Establish maximum shelter allowances not to exceed 84% of the current maximum standard of need for ADC and Home Relief family cases;

— Establish maximum monthly grants not to exceed 85% of the present standard of need and maximum shelter allowances not to exceed 75% of the maximum standard of need, for childless employable Home Relief recipients;

— Establish maximum monthly grants not to exceed 90% of the present standard of need and maximum shelter allowances not to exceed 84% of the maximum standard of need, for childless unemployable Home Relief recipients;

— Authorize the Commissioner to exempt categories of recipients of Home Relief and ADC from the limitations on grant levels;

— Eliminate public assistance and Medicaid eligibility for any alien illegally residing in the United States or unable to prove legal residency, and require immediate referral to the U.S. Immigration and Naturalization Service or appropriate consulate;

— Limit the scope of the Emergency Assistance to Needy Families with Children (EAF) program so as to preclude its expansion as a broad system of supplementary grants for persons receiving ADC, and to specifically prohibit mandated emergency grants to duplicate regular public assistance grants for items of need that have been lost, stolen or mismanaged;

— Clarify those circumstances under which a local social services district has authority to issue payments on a vendor restricted basis for Home Relief recipients;

— Require that those Home Relief recipients or applicants who appear eligible for SSI and who apply for SSI eligibility but are denied, must appeal that determination.

B. *Services*—Various sections of the Social Services Law and the Education Law would be amended to:

— Eliminate requirements for local social services districts to fund services beyond levels with matching Federal Title XX funds;

— Make certain mandated services optional under the Title XX program;

— Require every local social services district to plan sufficiently to insure that expenditures for services are available for eligible persons throughout the year, and that mandated services are provided before optional services; and give the Commissioner of Social Services the authority to direct changes in local services plans to comply with these requirements;

— Expand those circumstances when a local social services district can purchase day care services from private proprietary facilities to include those instances when such facilities can provide quality care more cheaply than accessible non-profit facilities.

— Limit local and State liability for the cost of providing secular education to children in Union Free School Districts which are operated by child care agencies, to those levels in conformance with standards of payment established by DSS.

C. *Medicaid*

1. *Services*—Various sections of the Social Services Law and Education Law would be amended to:

— Eliminate Medicaid coverage for the following:

° dental care for persons 21 or older, except in situations to relieve pain and suffering;

° care, service, and supplies of podiatrists and chiropractors;

° care, services, and supplies of physical therapists, occupational therapists, and speech pa-

thologists, except when such items of care, services, and supplies are provided at the directions of a physician;

° care and services of a private duty nurse on an in-patient basis; and

° certain drug groupings.

— Establish copayment amounts in the following manner:

° for medical and prosthetic appliances, supplies, and equipment, dental care, and glasses for persons 21 or older, at an amount not to exceed that authorized by Federal law and regulation; and

° for drugs covered under Medicaid, at an amount of up to $.50 for each prescription.

— Establish a formulary for substitute generic equivalents when brand names are prescribed.

2. *Inpatient Hospital Care*—Various sections of the Public Health Law would be amended to:

— Eliminate Medicaid coverage for Friday and Saturday admissions, except for emergency care or pre-operative care; and

— Authorize reclassification of beds so that hospitals are reimbursed at the long-term care rate for Medicaid recipients who require care at a long-term care level.

3. *Clinics, Outpatient Departments, and Emergency Rooms*—Various sections of the Public Health Law would be amended to:

   — Reduce existing rates by 10% for all clinics, emergency rooms, and outpatient department visits; and place a cap on these rates of $50 with exceptions for services specified by the Commissioner of Health;

   — Require certain hospital procedures of an uncomplicated nature to be performed on an outpatient basis.

4. *Long Term Care Facilities*—Various sections of the Public Health Law would be amended to:

   — Better control placement in and utilization of long-term care facilities by defining standards of care for each level of care; establishing criteria for each admission; and authorize reclassification of beds so that facilities are reimbursed at the appropriate long-term rate for that bed.

   — Extend the provisions which suspend the application of subdivision 3 of section 2807.

5. *Eligibility*—The Social Services Law would be amended to:

   — Reduce Medicaid income eligibility levels to the public assistance levels.

Governor's Bill Jacket

Statement in Support of Bill

A. *Income Maintenance*

Reductions in the basic grant and maximum shelter allowance for public assistance recipients have taken into consideration the following criteria:

— No person is placed below the poverty level.

— The reductions are targeted, to the extent possible, upon those most able to sustain a reduction in public assistance—those who are employable, childless persons who are mobile and therefore more capable of finding work.

— To the maximum degree possible, assistance to family cases is protected.

Concerning EAF, a number of recent court decisions have interpreted the current EAF statute that any person who can demonstrate "destitution", regardless of the cause, can obtain an emergency grant. This proposal would establish in State Law those specific limitations which the State had previously attempted to adopt by regulation. It would clearly delineate those situations of legitimate need arising out of unforseeable catastrophes for which emergency grants would be available. This proposal should have little direct impact on the Aid to Dependent Children caseload, since those needs previously recognized under State regulations would continue to be met as items of special need under the ADC program, rather than under EAF.

Expanded use of vendor restricted payments will reduce State-local Home Relief expenditures by limiting the fre-

quency of duplicate grants for rent and utilities, and by ensuring greater administrative controls over Home Relief grants.

Requiring greater perseverance in appealing SSI ineligibility determinations will increase Federal assistance for the needy through expanded use of SSI for Home Relief applicants and recipients who are SSI eligible, and thereby reduce the size of the Home Relief caseload. No assistance would be denied a person during this process, because Home Relief benefits would be available when such eligibility is so determined.

B. *Services*

Elimination of State funding in excess of that necessary to match Federal funds for supportive services under Title XX will cause a reduction in the over-all level of services, but will not require a reduction or elimination of any particular service(s).

In order to limit the impact of this proposal on the Title XX services programs, legislation and administrative actions will be undertaken to:

a. Reduce the number of mandated services in the Title XX program.

b. Require that mandated services be provided only when Federal Title XX funds are available.

c. Reduce the income level at which fees for day care are imposed; the level would be reduced from 80% of median income to the 62% level. This action will release Title XX funds for alternative uses.

d. Modify the services-maintenance formula for claiming foster care reimbursement for non-ADC eligible institutionalized children. This will cause almost $9.0 million in State aid to shift from "above Title XX funding" to Income Maintenance funding, rather than to limit Title XX funding.

e. Permit local districts to purchase day care from the cheapest day care facility, regardless of its type of ownership. This measure will permit Title XX funds to be used for other purposes.

Restricting reimbursement to certain Union Free School Districts will be undertaken in a manner which will adequately meet the needs of a variety of students, but will minimize unnecessary services. These UFSD's will be required to effect the same kind of economies of education which school districts throughout the State are being forced to adopt.

C. *Medicaid*

1. *Services*

New York State provides a variety of services which are optional under Federal law. Several of these will be eliminated or restricted under Medicaid coverage. No services of an essential nature would be eliminated. Others would be restricted to insure their provision only when necessary.

Limiting the availability of adult dental care to instances for relieving pain and suffering will not preclude an individual from receiving essential care. Elimination of

podiatry and chiropractic services should have little effect on patients, since many of the services provided by these practitioners are non-essential. Essential treatment could still be provided by a physician, when necessary. Restrictions on therapy will assure that unnecessary use of services will be minimized through the requirement that a physician direct such care. None of the drugs to be eliminated are used in life-threatening situations. And over-the-counter substitutes are frequently available for most of these drugs.

A co-payment on drugs and various services and appliances will help to provide an incentive for doctors to prescribe and patients to acquire such services only when necessary.

Substitution of generic equivalents should have no medical impact upon the Medicaid recipient. But considerable savings should result, since generic equivalents are cheaper than many trade name drugs.

2. *Inpatient Hospital Care*

Changes in the methodology for reimbursing hospitals are necesary to help eliminate unnecessary expenditures and encourage efficiencies in the operation of these health care institutions.

Elimination of non-emergency Friday and Saturday admissions to hospitals, and reimbursement for long-term care for long-term care patients will help to insure that Medicaid reimbursement is consistent with actual care provided.

3. *Clinics, Outpatient Departments, and Emergency Rooms*

Restructuring clinic rates will help to eliminate unnecessary expenditures and encourage efficiencies in the operation of these health care facilities. In New York State, clinic rates range from $20 to $91. At the same time, for a visit to a private doctor's office, Medicaid pays only $7.80. While the clinic visit generally includes more than just the physician services, e.g., includes laboratory and x-ray tests, and perhaps drugs, the difference between the clinic and physician rates has come under increasing question.

Requiring certain hospital procedures of an uncomplicated nature to be performed on an outpatient basis will insure the same care at reduced costs, and will help efforts to reduce the oversupply of hospital beds.

4. *Long-Term Care Facilities*

Changes in the methoodology for reimbursing long-term care facilities are necessary to help eliminate unnecessary expenditures and encourage efficiencies in the operation of these health care institutions.

Better controlling placement in long-term care facilities should reduce Medicaid costs for inappropriate placements and also help to achieve a more appropriate balance of the supply among different types of long-term care facilities.

Extending existing statutory provisions which suspend reasonable cost requirements for determining rates for long-term care facilities will permit a continuation of the existing methodology for determining such rates.

Governor's Bill Jacket

[LETTERHEAD OF]

LEGISLATIVE REPORT

New York State Council of Churches
3049 E. Genesee Street, Syracuse, N.Y. 13224

Vol. VI 77-8 March 22, 1977

Rarely does the New York State Council of Churches inject itself into the budget operations except from a philosophical nature, basicically in the Delivery of Human Services for those in need and to see that programs are adequately supported so that those who receive services and deliver services do not have more than normal fiscal and job security morale depressions. However, S-1347—A-1647 is more than a budget bill. It is an attempt by the administration to implement rules and regulations which are being debated by legislative committees and both houses in their struggle to equate finances and services. The sections we question are those under which government will seek additional reimbursement and in the process move administrative regulations into Chapter Law. These sections place more power to the department commissioners and the Director of Budget authorities than legislative action.

We understand that it is an attempt to achieve greater funding under Title 20 reimbursements. We also see that it is placing total control of the flow of funds and types of service at the impersonal level of Albany. No practitioner of his profession in the field of social work, the pharmaceutical profession or medical field could make a patient

related decision of patient care in the "best interest of the patient" or client as paramount with the present Long Term Care Program now in effect. Section 19 of the bill (page 9, line 12) places the (DMS-1) "The Long Term Care Placement Form" into law.

Stability and human concern which are necessary in the trust relationships of the consumer to the professional practitioners are totally abrogated. Every consumer will realize that the practitioner must first clear the administrative computer for the bureaucracy to insure compliance for reimbursement.

Technically, this measure would only affect state related expenditures, but of necessity those services provided by private carriers of health and social services will be screened by these encompassing regulations. This means that every citizen of New York State who becomes ill or in need of services will be able to be moved or shuffled at the discretion of a bureaucracy rather than because of needs of services to maintain a healing climate. We would ask, "What will the cost of transportation be and who would do it?" "How will the uprooting and transferring of patients away from family and support community to inaccessible or distant places gain trust, hope, or security in a crisis situation?" We understand the need for controls, corrections and accountability within the Human Services field, but this should be within the bureaucracy and *not* at the expense of the patient.

The function of Health Services is to create a climate in which healing can take place.

If through the interpretation of S-1347—A-1647, social connections and trust relationships are broken, the patient will deteriorate and the raison d'etre of of professional persons will disappear.

We also see this measure as an administrative action to get departmental regulations into law which would require legislative action to change. Thus, the legislature could become the legal scapegoat for departmental actions and shifting of administrative responsibility to specific legislative law, rather than legislative directive and intent.

If S-1347 is passed, fee scales and specific point regulations would be frozen in time and require State Legislative action to implement changing federal regulations, thus placing New York in a position of being unable to respond to opportunities for federal funds involved in regulatory change.

Regulations are recognized as Administrative Rules, not Law, a legislative act is Law. We do not feel or see the need to codify the topics of S-1347—A-1647 into legal code through the multiphase pressure of a budget bill. We oppose this measure.

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Governor's Bill Jacket

SENATE JOURNAL
MAR 31 1977
PAGE 87

1977

ASSEMBLY

The Assembly bill by Mr. BUDGET BILL Calendar No. 491

Assembly No. 1647 A

Sen. Rept. No. _____

Entitled: "

AN ACT

to amend the social services law and the public health law, in relation to controls of expenditures under the medical assistance program, public assistance program, the home relief program and repealing certain provisions of the social services law relating thereto

" was read the third time DEBATE WAS HAD THEREON

No. 1 (THREE DAY MESSAGE OF GOVERNOR)

The President put the question whether the Senate would agree to final passage of said bill, and the facts which necessitate an immediate vote thereon having been certified by the Governor, the same being upon the desks of the members in final form, it was decided in the affirmative, a majority of all the members elected voting in favor thereof and three-fifths being present as follows:

AYE	Dist.		NAY	AYE	Dist.		NAY
	47	Mr. Anderson			15	Mr. Knorr	
	49	Mr. Auer			1	Mr. LaValle	
	16	Mr. Babbush			29	Mr. Leichter	—
	45	Mr. Barclay			8	Mr. Levy	
	18	Mr. Bartosiewicz			22	Mr. Lewis	—
	23	Mr. Beatty			50	Mr. Lombardi	
	25	Ms. Bellamy			24	Mr. Marchi	
	33	Mr. Bernstein			5	Mr. Marino	
	19	Mr. Bloom			48	Mr. Mason	
	12	Mr. Bronston			26	Mr. McCall	
	41	Mr. Bruno			59	Mr. McFarland	
	9	Ms. Burstein			42	Mr. Nolan	
	7	Mr. Caemmerer			27	Mr. Ohrenstein	
	34	Mr. Calandra			17	Mr. Owens	
	21	Mr. Conklin			11	Mr. Padavan	
	46	Mr. Donovan			60	Mr. Peterson	—
	6	Mr. Dunne			53	Mr. Perry	
	54	Mr. Eckert			36	Mr. Pisani	
	10	Mr. Farber			57	Mr. Present	
	44	Mr. Farley			39	Mr. Rolison	
	35	Mr. Flynn			31	Mr. Ruiz	
	32	Mr. Galiber	—		40	Mr. Schermerhorn	
	30	Mr. Garcia			2	Mr. Smith, B.C.	
	14	Mr. Gazzara			51	Mr. Smith, W.T.	
	13	Mr. Gold			43	Mr. Stafford	
	26	Mr. Goodman			55	Mr. Tauriello	
	37	Mr. Gordon			3	Mr. Trunzo	
	56	Mr. Griffin			58	Mr. Volker	
	20	Mr. Halperin			52	Mr. Warder	—
	4	Mr. Johnson			38	Mrs. Winikow	

AYES 54

NAYS 3

¶ Ordered, that the Secretary return said bill to the Assembly with a message that the Senate has concurred in the passage of the same.

Governor's Bill Jacket

A-1645-A Bill Jacket

3/31 1977 Assembly Amendment

(Republicans in Italics)

Those Who Voted In the Affirmative	Those Who Voted In the Negative
Mr. Abramson	
Miss Amatucci	
Mr. Barbaro	
Mr. Berardi	
Mr. Betros	
Mr. Bianchi	
Mr. Boyland	
Mr. Brewer	
Mr. Burns	
Mr. Burrows	
Mr. Bush	
Mr. Butler	
Mr. Calegaro	
Mr. Cincotta	
Mr. Cochrane	
Mrs. Connelly	
Mr. Conners	
Mr. Conner	
Mr. Cook	
Mr. Cooperman	
Mr. Culhane	
Mr. Daly	
Mr. D'Amato	
Mr. D'Andrea	
Mr. Dearie	
Mr. DelliBovi	
Mr. Del Toro	
Mr. DeSalvio	
Mr. DiCarlo	
Mrs. Diggs	
Mr. Dobuchitz	
Mr. Duryea	
Mr. Dwyer	
Mr. Emery	
Mr. Engel	
Mr. Esposito	
Mr. Eve	
Mr. Farrell	
Mr. Fervie	
Mr. Field	
Mr. Fink	
Mr. Finneran	
Mr. Flack	
Mr. Flanagan	
Mr. Fortune	
Mr. Fremming	
Mr. Frey	
Mr. Friedman	
Mr. Goldstein	
Mrs. Gualtieri	
Mr. Goraki	
Mr. Gottfried	
Mr. Graber	
Mr. Grannis	
Mr. Green	
Mr. Greenberg	
Mr. Griffith	
Mr. Gulotta	
Mr. Hanna	
Mr. Hannon	
Mr. Harenberg	
Mr. Harris	
Mr. Hawley	
Mr. Healey	
Mr. Henderson	
Mr. Herbst	
Mr. Hevesi	
Mr. Hinchey	
Mr. Hochbrueckner	
Mr. Hoyt	
Mr. Hurley	
Mr. Keane	
Mr. Kelleher	
Mr. Kidder	
Mr. Koppell	
Mr. Kremer	
Mr. Lafayette	
Mr. Landes	
Mr. Lane	
Mr. Lasher	
Mr. Lee	
Mr. Lehner	
Mr. Lentol	
Mr. Levy	
Mr. Lewis	
Mrs. Lipschutz	
Mr. Lopresto	
Mr. Marchiselli	
Mr. Marshall	
Mr. Martin	
Mr. McCabe	
Mrs. McGee	
Mr. McGrath	
Mr. McInerney	
Mr. Mega	
Mr. Miller (G.W.)	
Mr. Miller (H.M.)	
Mr. Miller (M.H.)	
Mr. Mirto	
Mr. Molinari	
Mr. Montano	
Mr. Murphy (G.A.)	
Mr. Murphy (M.J.)	
Mr. Nadler	
Mr. Nagle	
Mr. Nicolosi	
Mr. Nine	
Mr. Nortz	
Mr. Orazio	
Mr. Passannante	
Mr. Peace	
Mr. Posner	
Mr. Proud	
Mr. Rappleyea	
Mr. Reilly	
Mr. Riford	
Mr. Robach	
Mr. Ross	
Mr. Ryan (A.W.)	
Mr. Ryan (E.F.X.)	
Mr. Schimminger	
Mr. Schmidt	
Mr. Schumer	
Mr. Sears	
Mr. Serrano	
Mr. Siegel	
Mr. Silver	
Mr. Silverman	
Mr. Solomon	
Mr. Stavisky	
Mr. Stein	
Mr. Stephens	
Mr. Strelzin	
Mr. Sullivan (E.C.)	
Mr. Sullivan (P.M.)	
Mr. Tallon	
Mr. Tills	
Mr. Vann	
Mr. Velella	
Mr. Virgilio	
Mr. Walsh	
Mr. Warren	
Mr. Wemple	
Mr. Weprin	
Mr. Wertz	
Mr. Wilson	
Mr. Yevoli	
Mr. Zagame	
Mr. Zimmer	
Mr. Speaker	

AYES ..... 64 .....

NOES ..... 86 .....

Governor's Bill Jacket

A-1649-A Budget Bill

3/31

1977

Medical Assistance passage

No. 3-159

(Republicans in Italics)

Those Who Voted in the Affirmative	Those Who Voted in the Negative
Mr. Abramson	
Miss Amatucci	
Mr. Barbaro	
Mr. Bersani	
Mr. Betros	
Mr. Bianchi	
Mr. Boyland	
Mr. Brewer	
Mr. Burns	
Mr. Burrows	
Mr. Bush	
Mr. Butler	
Mr. Calogero	
Mr. Cincotta	
Mr. Cochrane	
Mrs. Connelly	
Mr. Conners	
Mr. Connor	
Mr. Cook	
Mr. Cooperman	
Mr. Culhane	
Mr. Daly	
Mr. D'Amato	
Mr. D'Andrea	
Mr. Deane	
Mr. DelliBoni	
Mr. Del Toro	
Mr. DeSalvio	
Mr. DiCarlo	
Mrs. Diggs	
Mr. Dukuchitz	
Mr. Duryea	
Mr. Dwyer	
Mr. Emery	
Mr. Engel	
Mr. Esposito	
Mr. Eve	
Mr. Farrell	
Mr. Ferris	
Mr. Field	
Mr. Fink	
Mr. Finneran	
Mr. Flack	
Mr. Flanagan	
Mr. Fortune	
Mr. Fremming	
Mr. Frey	
Mr. Friedman	
Mr. Goldstein	
Mrs. Goodhue	
Mr. Gorski	
Mr. Gottfried	
Mr. Graber	
Mr. Grannis	
Mr. Greco	
Mr. Greenberg	
Mr. Griffith	
Mr. Gulotta	
Mr. Hanna	
Mr. Hannon	
Mr. Harenberg	
Mr. Harris	
Mr. Hawley	
Mr. Healey	
Mr. Henderson	
Mr. Herbst	
Mr. Hevesi	
Mr. Hinchey	
Mr. Hochbrueckner	
Mr. Hoyt	
Mr. Hurley	
Mr. Keane	
Mr. Kelleher	
Mr. Kidder	
Mr. Koppell	
Mr. Kremer	
Mr. Lafayette	
Mr. Landes	
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Mr. Levy	
Mr. Lewis	
Mrs. Lipschutz	
Mr. Lopresto	
Mr. Marchiselli	
Mr. Marshall	
Mr. Martin	
Mr. McCabe	
Mrs. McGee	
Mr. McGrath	
Mr. McInerney	
Mr. Mega	
Mr. Miller (G.W.)	
Mr. Miller (H.M.)	
Mr. Miller (M.H.)	
Mr. Mirto	
Mr. Molinari	
Mr. Montano	
Mr. Murphy (G.A.)	
Mr. Murphy (M.J.)	
Mr. Nadler	
Mr. Nagle	
Mr. Nicolosi	
Mr. Nine	
Mr. Norts	
Mr. Orazio	
Mr. Pamannante	
Mr. Pesce	
Mr. Posner	
Mr. Proud	
Mr. Rappleyea	
Mr. Reilly	
Mr. Riford	
Mr. Robach	
Mr. Ross	
Mr. Ryan (A.W.)	
Mr. Ryan (E.F.X.)	
Mr. Schimminger	
Mr. Schmidt	
Mr. Schumer	
Mr. Sears	
Mr. Serrano	
Mr. Siegel	
Mr. Silver	
Mr. Silverman	
Mr. Solomon	
Mr. Stavisky	
Mr. Stein	
Mr. Stephens	
Mr. Strelzin	
Mr. Sullivan (E.C.)	
Mr. Sullivan (P.M.)	
Mr. Tallon	
Mr. Tills	
Mr. Vann	
Mr. Velella	
Mr. Virgilio	
Mr. Walsh	
Mr. Warren	
Mr. Wemple	
Mr. Weprin	
Mr. Wertz	
Mr. Wilson	
Mr. Yevoli	
Mr. Zagame	
Mr. Zimmer	
Mr. Speaker	

AYES ..... 127 .....

NOES ..... 23 .....

Opinion of District Court, June 23, 1980, 493 F. Supp. 865

(Reproduced in the Appendix to the Jurisdictional Statement at J.S. 22a.)

Judgment and Order of the District Court, July 31, 1980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2823 L.P.G.

JEANNE BACON, individually and on behalf of her minor children ROBERT BACON, and IFE BACON, and on behalf of all other persons similarly situated,

Plaintiffs,

and

FREDDIE MAE GOODWINE, LINDA SELDERS and GERTRUDE PARRISH,

Plaintiffs-Intervenors,

against

PHILIP L. TOIA, individually and as Commissioner of the Department of Social Services of the State of New York, and CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Defendants.

Plaintiff Jeanne Bacon having commenced the above entitled action pursuant to 42 U.S.C. §1983 on behalf of herself, her minor children and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure, and the defendants having submitted answers to the complaint, and plaintiff Bacon having moved by order to show cause on June 13, 1977, for a preliminary injunction,

and plaintiffs having moved for a class action order by notice of motion dated June 22, 1977, and Freddie Mae Goodwine, Linda Selders and Gertrude Parrish having intervened as parties plaintiffs, and plaintiffs having moved for summary judgment by notice of motion dated August 31, 1977, and this Court having rendered an opinion dated September 29, 1977, determining that plaintiffs motions for a class action order and for summary judgment should be granted, and this Court on October 21, 1977, having entered its order certifying the action as a proper class action and having entered its judgment in accordance with its opinion, and the United States Court of Appeals for the Second Circuit on May 11, 1978, having affirmed the judgment and order of the district court, and the Court of Appeals, on August 21, 1978, having granted defendants' motion for rehearing, and having vacated the judgment of the district court, and remanding the action to the District Court to consider the parties' contentions regarding *Quern* v. *Mandley*, 436 U.S. 725 (1978) "as well as the remaining issues in the case, if necessary", and defendant Toia, by notice of motion dated November 14, 1979, having moved for reconsideration of plaintiffs' motion for summary judgment, or, in the alternative, for summary judgment, and this Court on February 1, 1979, having rendered its memorandum opinion that New York Social Services Law, §350-j(2)(c), (2)(e) and (2)(f) do not conflict with the federal Social Security Act, and this Court, on June 23, 1980, having rendered its memorandum decision finding that New York Social Services Law, §350-j(2)(c) is unconstitutional and that New York Social Services Law §350-j, (2)(e) and (2)(f) are constitutional, it is hereby

Judgment and Order of the District Court

ORDERED (1) that plaintiffs' claims for damages be and the same hereby are dismissed; and it is further

ORDERED (2) that defendant's motion for summary judgment be and hereby is granted to the extent that defendants are entitled to judgment with respect to the prayers for injunctive and declaratory relief in the complaint based on the alleged invalidity and unconstitutionality of New York Social Services Law, §350-j(2)(e) and (2)(f), and is denied with respect to the prayers for injunctive and declaratory relief in the complaint based on the alleged invalidity and unconstitutionality of New York Social Services Law, §350-j(2)(c); and it is further

ORDERED (3) that plaintiffs' motion for summary judgment be and the same hereby is granted to the extent that the complaint prays for injunctive and declaratory relief based on the alleged unconstitutionality of New York Social Services Law, §350-j(2)(c), and is denied to the extent that the complaint prays for injunctive and declaratory relief based on the alleged invalidity and unconstitutionality of New York Social Services Law, §350-j(2)(e) and (2)(f); and it is further

ORDERED, ADJUDGED AND DECREED (4) that defendants be and hereby are granted judgment dismissing the action on the merits to the extent that the complaint seeks relief based upon the alleged invalidity and unconstitutionality of New York Social Services Law, §350-j(2)(e) and (2)(f); and it is further

ADJUDGED AND DECREED (5) that plaintiffs are entitled to and are hereby granted a declaratory judgment declaring that New York Social Services Law, §350-j(2)(c) is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and it is further

ORDERED, ADJUDGED AND DECREED (6) that defendants, their officers, agents, employees, successors and all persons in active concert and participation with them be and hereby are permanently enjoined from enforcing New York Social Services Law, §350-j(2)(c) and from denying Emergency Assistance in the form of cash to an individual solely because the individual is eligible for or is receiving Aid to Families with Dependent Children assistance; and it is further

ORDERED (7) that the issues of attorneys' fees, costs and disbursements be and hereby is reserved for later determination by this Court upon appropriate motion made within three (3) months after the completion of all appellate proceedings herein.

Dated: New York, New York
July 30, 1980

/s/ LEE P. GAGLIARDI
United States District Judge

Judgment Entered 7/31/80
RAYMOND BURGHARDT
Clerk

To: Hon. Samuel Yasgur
County Attorney
County Office Building
White Plains, N.Y. ;0601

Opinion of the Court of Appeals, May 4, 1981, 648 F.2d 801

(Reproduced in the Appendix to the Jurisdictional Statement at J.S. 3a.)

Order of the Court of Appeals Denying Rehearing, July 22, 1981

(Reproduced in the Appendix to the Jurisdictional Statement at J.S. 1a.)

Notice of Appeal, October 2, 1981 and Filed October 5, 1981

(Reproduced in the Appendix to the Jurisdictional Statement at J.S. 50a.)

Judgment of the District Court, October 5, 1981

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2823 L.P.G.

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated,

Plaintiffs,

and

FREDDIE MAE GOODWINE, LINDA SELDERS and GERTRUDE PARRISH,

Plaintiffs-Intervenors,

against

PHILIP L. TOIA, individually and as Commissioner of the Department of Social Services of the State of New York, and CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Defendants.

Plaintiff Jeanne Bacon having commenced the above entitled action pursuant to 42 U.S.C. §1983 on behalf of herself, her minor children and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure, and this Court having entered a judgment and order on the 31st day of July, 1980, which, *inter alia,* granted

plaintiffs injunctive and declaratory relief against the enforcement of section 350-j(2)(c) and (3) of New York Social Services Law, granted defendants judgment on the merits to the extent that the complaint seeks relief against the enforcement of New York Social Services Law §350-j (2)(e), and which reserved the question of attorneys' fees, costs and disbursements for later determination, and the United States Court of Appeals on May 4, 1981, having affirmed in part and reversed in part the judgment of the district court, it is hereby

ORDERED (1) that plaintiff's motion for summary judgment be and the same hereby is granted to the extent that the complaint prays for injunctive and declaratory relief based on the alleged unconstitutionality of New York Social Services Law, §350-j(2)(e), and it is further

ADJUDGED AND DECREED (2) that plaintiffs are entitled to and are hereby granted a declaratory judgment declaring that New York Social Services Law, §350-j(2)(e) is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to the extent that it results in the automatic denial of Emergency Assistance because the emergency allegedly arose from the loss or theft of a regular public assistance grant; and it is further

ORDERED, ADJUDGED AND DECREED (3) that defendants, their officers, agents, employees, successors and all persons in active concert and participation with them be and hereby are permanently enjoined from enforcing New York Social

Services Law, §350-j(2)(e) to the extent that it automatically denies Emergency Assistance in all cases of loss or theft of a regular public assistance grant.

Dated: October 2, 1981
New York, New York

/s/ LEE P. GAGLIARDI
United States District Judge

Judgment Entered 10/5/81

RAYMOND F. BURGHARDT
Clerk

Motion to Dismiss or Affirm

FILED
NOV 20 1981
STEVAS,
CLERK

No. 81-770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BARBARA BLUM, as successor in office to PHILIP L. TOIA, sued individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

—against—

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated, FREDDI MAE GOODWINE, LINDA SELDERS and GERTRUDE PARISH; CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

Martin A. Schwartz, Of Counsel
Eileen R. Kaufman, Of Counsel
WESTCHESTER LEGAL SERVICES, INC.
Office & P.O. Address
171 East Post Road
White Plains, New York 10601
Tel: (914) 949-4797

Attorneys for Appellees

No. 81-770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BARBARA BLUM, as successor in office to PHILIP L. TOIA, sued individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

against

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated, FREDDI MAE GOODWINE, LINDA SELDERS and GERTRUDE PARISH; CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment of the United States Court of Appeals for the Second Circuit be affirmed on the grounds that the decision below is clearly correct, there is no conflict in the circuits, and an alternative ground exists upon which the judgment could be affirmed.

I.

THE STATUTES INVOLVED AND THE NATURE OF THE CASE.

The Emergency Assistance to Needy Families with Dependent Children ("EAF") program is a federal categorical assistance program which is designed to avoid the destitution of needy children. 42 U.S.C. §606(e). States which participate in this program must include an EAF provision in their AFDC plan. 42 U.S.C. §603(a)(5).

New York State participates in this program. N.Y. Social Services Law, §350-j. At issue in this case are three New York EAF provisions that discriminate against recipients of public assistance or against recipients of Aid to Families with Dependent Children assistance ("AFDC").

The plaintiffs-appellees (hereafter "plaintiffs") are recipients of AFDC assistance whose applications for EAF were automatically denied under the contested New York provisions. (Jurisdictional Statement, p.6.) Their position is that to the extent that the contested New York provisions discriminate against recipients of AFDC and other forms of public assistance, they violate the federal Social Security Act, 42 U.S.C. §606(e), and implementing regulation 45 C.F.R. 233.10(a)(1), and the Equal Protection Clause

of the Fourteenth Amendment. The judgment of the court below does no more than prohibit New York from discriminating against AFDC and other recipients of public assistance in carrying out its EAF program.

A. The Cash-Services Provisions.

The first contested New York provision automatically precludes persons who are eligible for AFDC assistance, but only such persons, from receiving Emergency Assistance in the form of cash. The New York statute provides that it is an eligibility requirement for Emergency Assistance that

> "in cases of applications for grants of cash assistance, such child or such household is not categorically eligible for or receiving aid to dependent children; . . . ." N.Y. Social Services Law, §350-j(2)(c).

This restriction is stated a second time in the New York statute:

> "Such emergency assistance, but not including cash grants, may be furnished to a family eligible for aid to dependent children only in the form of emergency services, ..." N.Y. Social Services Law, §350-j(3).

Thus, only individuals who are eligible for AFDC are singled out for the automatic denial of Emergency Assistance in the form of cash. Bacon v. Toia, 648 F.2d 801,807 (2d Cir. 1981) (14a).* Individuals who are eligible for any other category

* References to the Appendix to the Jurisdictional Statement are denominated ___ a.

of public assistance, such as Home Relief under New York Social Services Law, §158, and individuals who are not eligible for any category of public assistance, may receive Emergency Assistance in the form of cash or services.* During the more than four years that this case has been in litigation, neither the State Commissioner nor the courts below have suggested any possible rationale for this discrimination against persons eligible for AFDC assistance. The State Commissioner made "no attempt [in the courts below] to show that a valid purpose does underlie this provision. . . ." Bacon v. Toia, 648 F.2d 801,807 (2d Cir. 1981) (14a).

The court below agreed with the district court that there is no "reasonable basis" to limit persons eligible for AFDC to emergency services, while all other individuals may receive emergency cash or services. Bacon v. Toia, supra at 808. (17a). Applying the rational basis test, it found

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* An individual does not have to be eligible to receive public assistance in order to be eligible for Emergency Assistance. Quern v. Mandley, 436 U.S. 725,729 (1978); 42 U.S.C. §606(e); S.Rep. No. 744, 90th Cong. 1st Sess. 2 U.S. Code Cong. & Admin. News, p. 3003; Matter of Workman, 90 Misc.2d 74 (N.Y. Sup.Ct. Nassau Co. 1977), and cases cited therein.

that the statutory discrimination against persons eligible for AFDC violated the Equal Protection Clause.

The State Commissioner makes no attempt in this Court to offer any possible rationale for the discrimination. The State Commissioner's claim that the contested provisions do not in fact discriminate against persons eligible for AFDC is "little more than ipse dixit, substantially varying the plain language of the statute." Bacon v. Toia, 648 F.2d 801,808 (2d Cir. 1981) (16a).

B. The Loss-Theft Provision.

Another EAF provision in the New York Social Services Law also discriminates against AFDC recipients. N.Y. Social Services Law, §350-j(2)(e). This provision automatically denies Emergency Assistance to all public assistance recipients, including AFDC recipients, in all cases of loss or theft of a regular public assistance grant. The New York statute provides that it is an eligibility requirement for EAF that:

> "in the case of a person receiving public assistance, [destitution] did not result from the loss [or] theft . . . of a regular public assistance grant; . . . ." N.Y. Social Services Law, §350-j(2)(e).*

---

* This section also refers to the denial of Emergency Assistance in cases of "mismanagement" of the public assistance grant. The validity of denying EAF in mismanagement cases is not at issue in this case. Bacon v. Toia, 437 F.Supp. 1371,1385 n.12 (S.D.N.Y. 1977).

Under this provision, an AFDC or other recipient of public assistance who claims to have been the victim of the loss or theft of a public assistance grant is automatically denied EAF without any factual inquiry.* Neither the bona fides of the claimed loss or theft or the needs of the family are considered. On the other hand, when a non-recipient of public assistance applies for EAF and claims the loss or theft of any other form of income, such as Supplemental Security Income ("SSI") benefits, social security benefits, unemployment compensation, workman's compensation or wages, the application is given individual consideration. Bacon v. Toia, 648 F.2d 801,809 (2d Cir. 1981) (18a). Accord, Bacon v. Toia, 437 F.Supp. 1371,1385 (S.D.N.Y. 1977). As with the cash-services provision, neither the State Commissioner nor the courts below have been able to discern any possible rationale for this discrimination against AFDC recipients and other recipients of public assistance.

The court below found that the provision automatically

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* Public assistance in New York is defined as including "home relief, veteran assistance, aid to dependent children, medical assistance . . . , institutional care for adults and child care. . . ." N.Y. Social Services Law, §2(20).

denying EAF in all cases of loss or theft of public assistance, but not in cases of loss or theft of other forms of income, created an irrational classification which discriminated against public assistance (including AFDC) recipients in violation of the Equal Protection Clause. Bacon v. Toia, 648 F.2d supra at 806-809. (17-19a). The court agreed with the State Commissioner that the State has a legitimate interest in avoiding fraudulent or spurious claims. But the court found "nothing in the record to establish that public assistance recipients have a greater propensity than others for asserting fraudulent claims of lost or stolen funds. . . ." Id. at 809. (18a). "Where there is an equal potential for fraud among those in each of two classes, it is not reasonable on this basis to treat those classes differently." Id. The court found that this principle was clearly established by this Court's decision in Jimenez v. Weinberger, 417 U.S. 628 (1974).

The decision of the Court of Appeals only prohibits New York from continuing to discriminate against AFDC and other recipients of pulbic assistance in carrying out its EAF program. It does not otherwise interfere with New York's power to establish and limit the eligibility requirements for Emergency Assistance, and is thus unlike the judgment reviewed in Quern v. Mandley, 436 U.S. 725 (1978).

Plaintiffs will demonstrate in Point II, infra, that plenary review is not warranted in this case because the judgment of the court below is clearly correct and the State Commissioner has not raised any substantial argument in her support. In Point III, infra, plaintiffs will demonstrate that there is no conflict in the circuits. In Point IV, infra, plaintiffs argue that the judgment below may be affirmed on a ground rejected by the court below, i.e., that the contested State provisions violate the federal Social Security Act and implementing HHS regulations to the extent that they discriminate against persons eligible for AFDC. The Secretary of HHS submitted an amicus curiae brief to the court below in full support of this position. A copy of this amicus curiae Brief is annexed to the Motion to Affirm as Appendix "A".

II.

THE JUDGMENT OF THE COURT BELOW IS CLEARLY CORRECT.

Plenary review should not be granted in this case because the judgment of the court below is clearly correct. The State Commissioner's arguments in this Court are insubstantial and were properly rejected by the court below.

A. The Cash-Services Provisions.

The contested New York provisions work automatic denials of cash EAF only to persons who are eligible for AFDC. New York provides EAF cash and services to all other persons, including recipients of other categories of public assistance, such as Home Relief under New York Social Services Law, §158, as well as to non-recipients of public assistance.

Since there is no reason to single out persons eligible for AFDC for the denial of cash EAF, the court below correctly found that the statutory discrimination against AFDC eligible persons was totally irrational and violative of the Equal Protection Clause.

Neither the court below nor the State Commissioner has been able to suggest any rationale for this discrimination. The court below stated that "[t]he Commissioner here makes no attempt to show that a valid purpose does underlie this provision. . . ." Bacon v. Toia, 648 F.2d 801,807 (2d Cir. 1981) (14a). Similarly, the district court stated that "[t]he state has offered no justification for this specific section in its brief, or in response to the court's inquiry." Bacon v. Toia, 493 F.Supp. 865,872-873 (S.D.N.Y. 1980) (37-38a). And, the

"sparse" legislative history does not suggest any basis for the discrimination. Bacon v. Toia, 493 F.Supp. 865,870 (S.D.N.Y. 1980) (31a).

The State Commissioner does not offer any justification in this Court for the State's discrimination against AFDC recipients. (Jurisdictional Statement, p.12). The State Commissioner's only argument is that AFDC and Home Relief recipients are treated alike because "the AFDC special grants set forth in N.Y. Social Services Law, §131-a(6) are equivalent to what a recipient of the State's Home Relief Program receive[s] as emergency assistance under . . . §350-j, ..." (Jurisdictional Statement, p.12).

This same argument was rejected by both the district court and the Court of Appeals. Bacon v. Toia, 493 F.Supp. 865,873 (S.D.N.Y. 1980); Bacon v. Toia, 648 F.2d 801,807-808 (2d Cir. 1981). (15-17a; 37-38a). It is frivolous for several reasons.

Section 350-j clearly states in two separate subsections that only persons eligible for AFDC may not receive cash EAF. N.Y. Social Services Law, §350-j(2)(c)(3). As the court below correctly stated, the State Commissioner's position is "little more than ipse dixit, substantially varying the plain

language of the statute." Bacon v. Toia, 648 F.2d 801,808 (2d Cir. 1981). In fact, the State Commissioner in this Court admits that subdivisions (2)(c) and (3) of New York Social Services Law §350-j "rendered appellees, as AFDC recipients, ineligible for such [cash EAF] assistance (although eligible for 'items of need' and services), ..." (Jurisdictional Statement, p.6).*

The fact that both Home Relief and AFDC recipients may receive cash grants under section 131-a(6) of the New York Social Services Law to replace furniture and clothing "as a result of a fire, flood or other like catastrophe" does not detract from New York's discrimination against AFDC recipients in its EAF program. The EAF program is a separate program and the New York Courts have consistently held that it is distinct from the special grant "fire, flood or other like catastrophe" provision. Howard v. Wyman, 28 N.Y.2d 434,438 n.3, 322 N.Y.S.2d 693 (1971); Gaillard v. Lavine, 51 A.D.2d 181, 380 N.Y.S.2d 7 (1st Dept. 1976) (concurring opinion);

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* The State Commissioner similarly admitted in the court below that: "In each case, cash Emergency Assistance was denied pursuant to NY SSL §350-j(2)(C)(e)(f) which prohibits cash grants of Emergency Assistance to AFDC recipients. . . ." (Brief of the State Commissioner in the Court of Appeals, October 30, 1980, p.6).

Nazario v. Commissioner of Social Services, 37 A.D.2d 630, 323 N.Y.S.2d 618 (2d Dept. 1971). And, this Court has specifically ruled that a special needs program and EAF are separate programs. Quern v. Mandley, supra at 737-739.

The special grant statute, section 131-a(6), and the EAF statute are not coterminous. Section 131-a(6) only authorizes grants to replace "furniture and clothing" and does not cover food, shelter and other immediate needs. By contrast, EAF is not so limited and is designed to provide "payments, care or services . . . necessary to avoid destitution", 42 U.S.C. §606(e), including assistance "[i]n the event of eviction . . . , or when an alcoholic parent leaves children without food, ..." S. Rep. 744, 90th Cong. 1st Sess. 2 U.S. Code Cong. & Admin. News, p. 3002.

In addition, section 131-a(6) only covers loss of furniture and clothing from "[f]ire, flood and other like catastrophe." It thus does not cover such emergencies as burglary, Howard v. Wyman, supra, confiscation of furniture upon eviction, Nazario v. New York Commissioner of Social Services, supra, or destruction of furniture by an angry spouse, Gaylord v. Toia, 65 A.D.2d 730, 410 N.Y.S.2d 295 (1st Dept. 1978). There are thus several decisions that hold that while these events do not constitute a "catastrophe" within the meaning of section 131-a(6), the victim is entitled to EAF under section 350-j.

Orr v. Shang, 66 A.D.2d 784, 410 N.Y.S.2d 654 (2d Dept. 1978); Nazario v. New York Commissioner of Social Services, supra; Brown v. Lavine, 47 A.D.2d 656, 364 N.Y.S.2d 33 (2d Dept. 1975). See also, Gaylord v. Toia, 65 A.D.2d 730, 410 N.Y.S.2d 295 (1st Dept. 1978); Bates v. Wyman, 36 A.D.2d 854, 321 N.Y.S.2d 664 (2d Dept. 1971). The court below was thus clearly correct in rejecting the State Commissioner's contention that the special grant and EAF programs are coterminous. Bacon v. Toia, 648 F.2d supra at 808. (16-17a).

The fact that New York does not discriminate against AFDC eligible persons in its special needs "fire, flood or other like catastrophe" program does not in any way cure, justify or detract from its discrimination against persons eligible for AFDC in its EAF program. Since there is no rational basis for this classification, and since the State Commissioner makes no attempt to suggest any, the judgment below enjoining the statutory discrimination was clearly correct. This is not an issue that justifies plenary review by this Court.

B. The Loss or Theft of Public Assistance Provision.

The State Commissioner in this Court and in the courts below has sought to justify the automatic denial of EAF in all cases of loss or theft of public assistance on the basis of the State's interest in guarding against fraudulent and

spurious claims. Bacon v. Toia, 648 F.2d 801,809 (2d Cir. 1981); Bacon v. Toia, 493 F.Supp. 865,874 (S.D.N.Y. 1980); Jurisdictional Statement, p.10. New York, however, does not automatically deny EAF in all cases of loss or theft, but only in cases of loss or theft of public assistance. Individuals who claim the loss or theft of non-public assistance funds, including public payments such as SSI, unemployment compensation and workman's compensation, are not automatically denied EAF. Significantly, the State Commissioner's Jurisdictional Statement makes no attempt to explain this disparity in treatment.*

The court below properly held that the State violates the Equal Protection Clause when it treats differently two classes of individuals who have an equal potential for fraud. Jimenez v. Weinberger, 417 U.S. 628 (1973). See also, United States v. Clark, 100 S.Ct. 895 (1980); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973); Lindsey v. Normet, 405 U.S. 56,74-78 (1972). Cf., Weinberger v. Salfi, 422 U.S. 749 (1975). In Jimenez v. Weinberger, supra, this Court, by an eight to one vote, found that the equal protection component of the Fifth Amendment was

* The State Commissioner refers to the fact that Subsection 2(f) of Section 350-j prohibits EAF when requested to "replace or duplicate a public assistance grant already made." This provision was initially challenged by plaintiffs. But plaintiffs withdrew their challenge when the district court ruled that this provision does not preclude EAF when unforseeable circumstances render a family destitute. Bacon v.Toia, 493 F.Supp. 865,875 (S.D.N.Y. 1980) (44a).

violated by a federal statute that automatically denied one class of illegitimate children benefits, though not another class of illegitimate children, because the two classes had an equal potential for fraud. The majority and dissenting opinions indicate that the decision was based on the rational basis test since the contested provision did not discriminate against illegitimate children, but rather treated two classes of illegitimate children differently. Jimenez v. Weinberger, supra at 631-632, 635-636; ibid at 638 (Rehnquist, J., dissenting). See also, United States v. Clark, 100 S.Ct. 895,901 (1980), reaffirming the validity of Jimenez.* However, the overriding principle in Jimenez is that it is simply irrational for government to treat differently two classes with an equal potential for fraud. This conclusion follows whether the rational basis or a middle test applies.

After recognizing "that the prevention of spurious claims is a legitimate governmental interest", the Jimenez Court found that:

> "[i]t does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. . . . [For] all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws." Jimenez v. Weinberger, supra at 635-636.

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* Schweiker v. Wilson, 101 S.Ct. 1074,1081-82 (1981), makes clear that the rational basis test applies when the contested statute classifies among persons who are members of a quasi-suspect class, as compared to discriminating against members of a quasi-suspect class.

The rationale of Jimenez is fully applicable to the instant case. In both Jimenez and in the instant case, the sole government interest advanced is the prevention of "spurious claims." Jimenez v. Weinberger, supra at 635. In each case, however, the government treated two classes with an equal potential for fraud differently. Whether recipients who claim the loss or theft of public assistance present the same potential for fraud as persons who claim the loss or theft of non-welfare funds must be determined on the basis of what "is shown in this record. . . ." Jimenez v. Weinberger, supra at 636 (emphasis added). As in Jimenez, there is nothing in the record in this case which provides a factual basis for concluding that public assistance recipients present a greater potential for fraud than non-recipients. Bacon v. Toia, 648 F.2d supra at 809 (18a). Significantly, the State Commissioner does not contend otherwise.

Courts have uniformly concluded that welfare recipients are "typical[ly] honest." Owens v. Roberts, 377 F.Supp. 45,53 (M.D.Fla. 1974)(three-judge court). Accord, Morgan v. Maher, 449 F.Supp. 229,233 (D.Conn. 1978)("[t]here is little indication that fraud is a frequent occurence. . . ."), aff'd, 591 F.2d 1331 (2d Cir. 1978); National Welfare Rights Organization v. Weinberger, 377 F.Supp. 861,865 n.3 (D.D.C. 1974). As this Court has

recognized, "[p]overty and immorality are not synonymous." Edwards v. California, 314 U.S. 160,177 (1941).

HHS agrees with this assessment. In its Amicus Curiae Brief in the court below, the Secretary stated:

> "The chance of fraud where a person claims to have lost his paycheck or workmen's compensation check are the same as those where a person claims to have lost a public assistance check. To think otherwise is to indulge in a factually unsubstantiated assumption that welfare recipients are unusually larcenous." Brief of the Secretary of Health and Human Services as Amicus Curiae, p.19 (Appendix "A" to this Motion).*

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* An HEW study shows that evidence of fraud exists "in less than one half of one percent of all open cases. . . ." National Welfare Rights Organization v. Weinberger, 377 F.Supp. 861,865 n.3 (D.D.C. 1974).

In addition, New York has at least an equal potential for detecting and minimizing fraud with respect to each of the two classes. All applicants for Emergency Assistance have the burden of establishing eligibility therefor. Lavine v. Milne, 424 U.S. 577 (1976); Matter of Woodley, 54 A.D.2d 912 (2d Dept. 1976). The state can verify all individual applications, Roldon v. Minter, 409 F.Supp. 663 (D.Mass. 1976)(threejudge court), and refer fraud cases for criminal prosecution. N.Y. Social Services Law, §145. Both the federal and State Emergency Assistance statutes contain a built-in protection against repeated fraudulent claims by limiting Emergency Assistance to a maximum of thirty days in any twelve-month period. 42 U.S.C. §606(e)(1); N.Y. Social Services Law, §350-j(2). Indeed, in the case of a fraudulent claim of loss or theft of public assistance, the State may recoup fraudulently obtained benefits from future welfare grants. N.Y. Social Services Law, §106-b. This remedy, by definition, is not available in the case of a non-recipient.

A similar issue was also presented in Lindsey v. Normet, 405 U.S. 56,74-78 (1972). In that case, this Court held that Oregon's double appeal bond requirement violated the Equal Protection Clause because it was applicable only to tenants who sought to take an appeal. While an appeal bond furthers the legitimate state interest of preventing frivolous appeals, the double bond requirement was unconstitutional because it "imposes additional requirements that . . . bear no reasonable relationship to any valid state objective and . . . arbitrarily discriminates against tenants appealing from adverse decisions in FED [i.e., landlord-tenant] actions." Lindsey v. Normet, supra at 76-77. Just as the Oregon statute arbitrarily discriminated against tenants in Lindsey, New York has arbitrarily discriminated against recipients of public assistance in this case.

Weinberger v. Salfi, supra, is clearly distinguishable from the instant case because the contested statute in that case did not provide for the different treatment of two classes of persons who have an equal potential for fraud.

The contested statute in Salfi worked an automatic denial of benefits to surviving spouses who had been married

for less than nine months. The nine-month rule constituted an "objective criterion" by which to gauge the validity of a marriage, and it was rational for the Government to conclude that as the duration of a marriage increases, the potential for fraud decreases. Those who were married for less than nine months rationally presented a greater potential for fraud than those who were married for more than nine months. It was thus clearly rational for the Government to distinguish between those who were married for more than nine months from those who were married for a lesser time.*

The "rational basis standard is 'not a toothless one'", and requires "[a]t the minimum level . . . that legislation classify persons it affects in a manner rationally related to legitimate governmental objectives." Schweiker v. Wilson, 101 S.Ct. 1074 (1981). While this test gives much deference to the legislature, there is simply no rational basis to support New York's discrimination against AFDC and other recipients of public assistance.

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* In addition, because of numerous statutory exceptions to the nine month rule, the rule operated "only within a somewhat narrow range of siutations lacking certain characteristics which might reasonably be thought to establish the genuineness of a marital relationship. . . ." Weinberger v. Salfi, supra at 780. This is simply not true about the contested statute in this case.

Therefore, plenary review is not warranted and the judgment of the court of appeals should be affirmed.

III.

THERE ARE NO CONFLICTS IN THE CIRCUITS.

The State Commissioner claims that there is a conflict in the circuits because "[t]he diametrically opposite result was reached in Mandley v. Quern, 635 F.2d 659 (7th Cir. 1980)." (Jurisdictional Statement, p.11). That case, however, did not involve the issue presented in this case, namely EAF discrimination against AFDC and other recipients of public assistance.

The Seventh Circuit decision in Mandley states that "[l]oss due to theft of cash is not covered because it is often impossible to verify." Mandley v. Quern, supra at 661 (emphasis added). While Mandley involves the denial of EAF in all cases of loss or theft of any type of cash, the instant case involves the validity of a State policy that results in the automatic denial of EAF only in cases of loss or theft of public assistance, but not in cases of the loss or theft of other funds. This discrimination against recipients of public assistance, and

New York's disparate treatment of two classes with an equal potential for fraud, was simply not present in Mandley. Mandley does not deal with this issue and does not even cite this Court's decision in Jimenez v. Weinberger, supra.

Mandley is thus clearly distinguishable from the instant case. It is not in conflict with the decision of the court below. There is simply no conflict in the circuits.

IV.

PLAINTIFFS' FEDERAL STATUTORY-REGULATORY CLAIM PROVIDES AN ALTERNATIVE BASIS UPON WHICH TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT.

The State Commissioner contends that because the court below ruled against the plaintiffs on their Supremacy Clause Claim, this "issue is not now before the [Supreme] Court." (Jurisdictional Statement, p.8). This is clearly erroneous. It is well "settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court. . . ." United States v. American Railway Express Co., 265 U.S. 425,435-436 (1924). Accord, United States v. New York Telephone Co., 434 U.S.

159,166 n.8 (1977); Mutual Life Insurance Co. v. Ludwig, 426 U.S. 479,480-481 (1976)(referring to American Railway Express as the "'inveterate and certain rule.'"); Dandridge v. Williams, 397 U.S. 471,475 n.6 (1970)("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." Stern and Gressman, Supreme Court Practice, p.478.

Therefore, while the court below rejected plaintiffs' federal statutory-regulatory claim, this Court may summarily affirm the judgment below on that ground.

In Quern v. Mandley, 436 U.S. 725 (1978), this Court ruled that section 406(e) of the Social Security Act sets forth the outer limits of eligibility for EAF and does not prohibit the states from narrowing those eligibility requirements. In reaching this conclusion, this Court gave HEW's interpretation of the federal EAF statute "considerable deference." Quern v. Mandley, supra at 743, n.19. Plaintiffs respectfully submit that the court below erred in not giving similar deference to the Secretary's position in favor of plaintiffs in this case.

In the court below, the United States Department of Health and Human Services (HHS), submitted an amicus curiae brief in support of plaintiffs' position that New York's

discrimination against AFDC recipients violates 42 U.S.C. §606(e) and 45 C.F.R. §233.10(a)(1). HHS' brief contains a complete analysis of the federal statutory-regulatory issue, including the relationship between section 406(e) as interpreted in Quern v. Mandley, 436 U.S. 725 (1978), and 45 C.F.R. §233.10 (a)(1).

The Secretary's amicus curiae brief in the court below asserts that this Court's decision in Quern is not controlling because Quern did not involve EAF discrimination against AFDC recipients. [Brief of the Secretary of Health and Human Services as Amicus Curiae, United States Court of Appeals for the Second Circuit, January 14, 1981, pp.5-6). In fact, as the Secretary pointed out, in sharp contrast to the contested New York provisions in this case, the Illinois statute at issue in Quern reasonably limited EAF to those eligible for AFDC. The Secretary stated:

> ". . . [Quern v.] Mandley should not be read to mean that States are not subject to any Federal requirements or conditions in their administration of their EA programs. . . . The kind of inequitable treatment in this case, which is discrimination against AFDC recipients, is particularly inconsistent with the purposes of the EA program. . . ." (Id.) (emphasis added).

HHS' position is that the contested New York provisions violate 45 C.F.R. §233.10, a provision which prohibits inequitable

treatment by the states in administering their categorical programs.* Since this regulation was promulgated pursuant to HHS' rulemaking power, 42 U.S.C. §§602(a)(5), 1302, it is a legislative rule which has the force of law and cannot be set aside unless "the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law.'" 5 U.S.C. §§706(2)(A)(C); Schweiker v. Gray Panthers, 101 S.Ct. 2633,2640 (1981); Batterton v. Francis, 432 U.S. 416 (1977). HHS interprets section 233.10 "to mean that a State's plan (and practices) may not discriminate against AFDC recipients with respect to EA", Secretary's Brief, pp.10-11, and that the New York provisions are thus invalid because they conflict with the federal regulation. (Secretary's Brief, pp.14-21).

The Court below rejected HHS' argument because

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* Section 233.10(a)(1) provides that:

> "The groups selected for inclusion in the [AFDC] plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act."

it thought that it "requires a conclusion that what Congress gave to the states in section 406(e) it reclaimed in section 402(a)(5) by leaving the Secretary a residual authority to evaluate the states' decisions for 'arbitrariness', 'unreasonableness', or 'inequity.'" Bacon v. Toia, 648 F.2d 801,806 (2d Cir. 1981) (12a).

The court below was in error in this regard. It is not inconsistent for Congress to give the states broad discretion in establishing EAF eligibility requirements, and at the same time give HHS power to establish rules that prohibit discrimination against the very persons the EAF program was intended to benefit. As HHS stated below, section 233.10(a)(1) creates "a permissible limit upon the discretion otherwise allowed the States by §406(e) of the Act. . . ." (Brief of the Secretary, supra p.6).

Even assuming that section 233.10(a)(1) is an interpretive rather than legislative rule, HHS' interpretation of section 406(e) should be given "considerable deference." In New York State Department of Social Services v. Dublino, 413 U.S. 405,421 (1973), this Court stated that the Secretary's interpretation "should be followed unless there are compelling indications that it is wrong. . . ." Accord, Miller v. Youakim, 440 U.S. 125,

99 S.Ct. 957,969 (1979); Beal v. Doe, 432 U.S. 438,447 (1977); Youakim v. Miller, 425 U.S. 231,235-236 (1976). HHS' position that state EAF provisions which discriminate against AFDC recipients serve to frustrate Congress' purpose in avoiding the destitution of needy children, is sound. It thus provides an alternative basis for this Court to affirm summarily the judgment of the court below.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully pray that the judgment of the court below be affirmed in all respects.

Dated: November 17, 1981
White Plains, New York

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Appendix

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 80-7725/7745

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated,

Plaintiffs-Appellants-Cross-Appellees,

—and—

FREDDIE MAE GOODWINE, LINDA SELDERS and GERTRUDE PARRISH,

Plaintiffs-Intervenors-Appellants-Cross-Appellees,

—against—

PHILIP L. TOIA, individually and as Commissioner of the Department of Social Services of the State of New York,

Defendant-Appellee-Cross-Appellant,

CHARLES W. BATES, individually and as Commissioner of Westchester County Department of Social Services,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE SECRETARY OF HEALTH AND HUMAN SERVICES AS AMICUS CURIAE

On December 1, 1980, the United States Court of Appeals for the Second Circuit granted plaintiffs-appellants' motion requesting that the court ask the Department of Health and Human Services for its views on this case. This brief is our response to that request.

Questions Presented

1. Whether New York Social Services Law § 350-j(2)(c), which allows persons who are eligible for AFDC assistance to receive Emergency Assistance (EA) only in the form of services while all others may receive EA in the form of cash or services, violates 45 C.F.R. § 233.10(a)(1), thereby violating § 402(a)(5) of the Social Security Act.

2. Whether New York Social Services Law § 350-j(2)(e), which denies EA to public assistance recipients, including AFDC recipients, in all cases of loss or theft of public assistance funds but which makes EA generally available in other cases of loss or theft, violates 45 C.F.R. § 223.10(a)(1), thereby violating § 402(a)(5) of the Social Security Act.

Statement

1. The Aid to Families with Dependent Children (AFDC) program (Title IV-A of the Social Security Act, 42 U.S.C. § 601 *et seq.*) was enacted by the Congress in 1935. The purpose of the program is that of

> encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in each State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. . . .

42 U.S.C. § 601.

2. The Congress subsequently added the Emergency Assistance (EA) program to Title IV-A of the Social Security Act as

part of the omnibus Social Security Amendments of 1967. Public Law 90-248, § 206; 81 Stat. 893. To participate in the EA program a State must include an EA provision in its AFDC State plan (the plan being required by § 402 of the Social Security Act). Section 406(e) of the Social Security Act is the principal statutory provision of the EA program. This provision defines the term "emergency assistance to needy families with children" and thereby sets forth the Federal scope of eligibility under the EA program. Unlike AFDC eligibility, EA eligibility is not limited to broken families with an absent parent. Rather, EA is also available to intact families with children if they are threatened with destitution, whatever the cause of their need.

3. As the Supreme Court held in *Quern* v. *Mandley*, 436 U.S. 725 (1978), the difference between the AFDC and EA programs and the breadth of the EA statutory language permits the States to extend EA eligibility to a narrower population than all who may be eligible under the Federal standard of § 406(e). The Social Security Act does not impose uniform standards of eligibility on State EA programs.

4. Section 402(a)(5) of the Social Security Act provides that a "State plan for aid and services to needy families with children must—provide such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan." This § 402 State plan requirement applies on its face to all aspects of the plan, including both the AFDC and EA programs. Similarly, § 1102 of the Social Security Act provides a delegation of rulemaking authority to the Secretary that reads as follows:

> The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this Act, as may be necessary to the efficient administration of the functions with which each is charged under this Act.

5. Pursuant to the above-stated delegations of rulemaking authority, the Secretary of the Department of Health and Human Services (HHS, formerly HEW) promulgated 45 C.F.R. § 233.10(a)(1), which sets forth general State plan requirements under Title IV-A. Section 233.10(a)(1) reads in part as follows:

> The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act.

The Office of Family Assistance, a component of the Social Security Administration, has determined that 45 C.F.R. § 233.10(a)(1) applies to the EA program and that subject regulation prohibits discrimination against AFDC recipients in the administration of the EA program unless the discrimination is tailored to or justified by the purposes of the assistance program.

Discussion

I.

NEW YORK SOCIAL SERVICES LAW § 350-j(2)(c), WHICH ALLOWS PERSONS WHO ARE ELIGIBLE FOR AFDC ASSISTANCE TO RECEIVE EMERGENCY ASSISTANCE (EA) ONLY IN THE FORM OF SERVICES WHILE ALL OTHERS MAY RECEIVE EA IN THE FORM OF CASH OR SERVICES VIOLATES 45 C.F.R. § 233.10(a)(1), THEREBY VIOLATING § 402(a)(5) OF THE SOCIAL SECURITY ACT.

A. Introduction

At the outset, it should be recognized that as regards the validity of the exclusions and restrictions found in New York's EA program the applicable Federal law is established by § 402(a)(5) of the Social Security Act and 45 C.F.R.

§ 233.10(a)(1) rather than by § 406(e) of the Act. For that reason, we do not think that the Supreme Court's interpretation of § 406(e) in *Quern* v. *Mandley,* supra, is controlling in this instance. The Court found in *Mandley* that § 406(e) allows the States great latitude in implementing the EA program. However, *Mandley* should not be read to mean that States are not subject to any federal requirements or conditions in their administration of their EA programs. The present action involves such a Federal requirement, namely the § 233.10(a)(1) State plan requirement which was promulgated pursuant to express statutory authority and which prohibits inequitable treatment of groups of individuals in the public assistance programs unless such treatment is justified by the purposes and provisions of the public assistance titles of the Social Security Act. The kind of inequitable treatment in this case, which is discrimination against AFDC recipients, is particularly inconsistent with the purposes of the EA program—as the EA legislative history shows. This Department views § 233.10(a)(1) as creating a permissible limit upon the discretion otherwise allowed the States by § 406(e) of the Act because the regulation is a legislative-type rule, itself having the force of law. The subject regulation has the force of statutory law because it was authorized by an express delegation from Congress and was validly promulgated. We will expand on this proposition and our interpretation of *Mandley* in the sections below.

B. A substantive, legislative-type regulation supported by a statutory delegation of authority has the force of law and should not be invalidated by the judiciary unless it is arbitrary and capricious or clearly inconsistent with the will of Congress.

Commentators and courts alike have drawn a distinction between two types of agency regulations: those that are legislative in nature and those that are interpretive. The Supreme Court recognized this distinction in *Batterton* v. *Francis,* 432 U.S. 416, 425 n.9 (1977), quoting the *Attorney General's Manual on the Administrative Procedure Act* to state that

legislative, or substantive, regulations issued by an agency pursuant to statutory authority and consistent with Congressional intent have the force and effect of law.

In *Batterton* the Court found that § 470(a) of the Social Security Act contained a delegation of authority to the Secretary of HHS to promulgate substantive regulations:

> Congress in § 407(a) expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC-UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.
>
> * * *
>
> The regulation at issue in this case is therefore entitled to more than mere deference or weight. It can be set aside only if the Secretary exceeded his statutory authority or if the regulation is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." 5 U.S.C. §§ 706(2)(A), (C).

432 U.S. at 425 (emphasis in original; footnote and citation omitted). The Court proceeded to reverse the holding of the Court of Appeals and found the regulation in question to be valid.

Similarly, Professor Kenneth Culp Davis has stated:

> The law about the distinction between interpretative and legislative rules is quite troublesome, but at the two extremes the law is quite clear. One very solid proposition is this: Whenever a legislative body has delegated power to an agency to make rules having force of law (whether or not the delegation is explicit) the rules the agency makes pursuant to the granted power have the same force

> as a statute if they are valid, and they are valid if they are constitutional, within the granted power, and issued pursuant to proper procedure; a court may no more substitute its judgment as to the content of a legislative rule than it may substitute its judgment as to the content of a state.

K. Davis, ADMINISTRATIVE LAW TEXT § 5.03 (3d ed. 1972).

The United States Court of Appeals for the Second Circuit has favored de-emphasis of the legislative-interpretive distinction, but this Court has forcefully asserted the principle of judicial deference to agency expertise and agency regulations. In *National Nutritional Foods Ass'n* v. *Weinberger,* 512 F.2d 688, 696 (2 Cir. 1975), *cert. denied* 423 U.S. 827 (1975), this Court made the following statements:

> We have come to recognize that, if the administrative process is to be practically effective, specific regulations promulgated pursuant to a general statutory delegation of authority must be treated as authoritative, whether labelled "substantive" or "interpretive," especially in areas where the agency possesses expertise not shared by the court.
>
> * * *
>
> Where once we may have demanded proof of specific delegation of legislative authority to an agency purporting to promulgate substantive rules we have learned from experience to accept a general delegation as sufficient in certain areas of expertise.

(Citations omitted.)

In sum, it is well established that a validly promulgated, substantive regulation has the force of law and is entitled to more than deference by the courts—it must be clearly inconsistent with its controlling statute before it may be overruled. Even where a regulation is deemed interpretive, it must be given deference by the courts, which should not substitute their judgment for the agency's.

C. Section 233.10(a)(1) of Title 45, C.F.R., is a valid, substantive regulation that was promulgated pursuant to §§ 402(a)(5) and 1102 of the Social Security Act.

Section 233.10(a)(1) of Title 45, C.F.R., along with other AFDC regulatory provisions, was published as a Notice of Proposed Rule-Making on June 5, 1970 at 35 *Federal Register* 8786. Comments were invited and received, and due consideration was given to them. On February 27, 1971, § 233.10(a)(1) was published in final form at 36 *Federal Register* 3866. Thus, the regulation met the rulemaking requirements of 5 U.S.C. § 533 and was promulgated in a procedurally valid manner.

The statutory authorization for this provision may be found in two places in the Social Security Act. First, there is the general delegation of rulemaking power to the Secretary in § 1102 of the Social Security Act as quoted above. A general delegation of authority similar to the above was at issue in *National Nutritional Foods Ass'n* v. *Weinberger,* 512 F.2d 688 (2 Cir. 1975), *cert. denied* 423 U.S. 827 (1975). The delegation in that case was § 701(a) of the Food and Drug Act, 21 U.S.C. § 371, which contains language similar to § 1102 and which this Court found to be an "expansive grant of authority." 512 F.2d at 695.

A more specific delegation of authority also exists to justify the validity of § 233.10(a)(1). That delegation is found in § 402(a)(5) of the Social Security Act, which provides that a "State plan for aid and services to needy families with children must . . . provide such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan." The delegation in § 402(a)(5) is highly analogous to the delegation involved in *Batterton* v. *Francis,* supra. The delegation at issue in *Batterton* was § 407(a) of the Social Security Act, which contains the key phrase "as determined in accordance with standards prescribed by the Secretary." This phrase is hardly different from "as found by the Secretary to be necessary for the proper and efficient operation of the plan," the language of § 402(a)(5). Thus, the similarity of § 407(a) and § 402(a)(5) provides a

strong indication that the latter section was also meant to be a delegation to promulgate substantive rules.

Section 233.10(a)(1) is a substantive or legislative-type regulation because it is a general program rule that does not attempt to interpret any particular phrase or provision of the Social Security Act. It is valid because it is consistent with the Congressional intent of the EA program and is not arbitrary or capricious.

D. Section 233.10(a)(1) of title 45, C.F.R., is consonant with the purposes of the Social Security Act and those of the Emergency Assistance (EA) program in particular, and it is not arbitrary or capricious.

Section 233.10(a)(1) states that "groups selected for inclusion in the plan . . . must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." That regulation has been interpreted by this Department to mean that a State's plan (and practices) may not discriminate against AFDC recipients with respect to EA. The Department's interpretation is entitled to judicial deference. *Ford Motor Credit Co. et al.* v. *Milhollin, et al.*, ____ U.S. ____, 100 S.Ct. 790, 797 (1980). The question then is whether § 233.10(a)(1), as interpreted, is compatible with the purposes and provisions of the EA program.

The Court of Appeals for the Second Circuit has previously addressed the question of whether discrimination against AFDC recipients is consistent with the purposes and provisions of the EA program. It held that such discrimination is inconsistent with the EA program. *Lynch* v. *Philbrook,* supra. More specifically, the Second Circuit found in *Lynch* that a Vermont regulation that prohibited the participation of AFDC recipients in its EA program was inconsistent with § 406(e) of the Social Security Act. Although some of the reasoning behind that decision may be modified in light of *Quern* v. *Mandley,* supra, much of it is still valid. The central issue in *Mandley* was whether § 406(e) of the Social Security Act, which contains the

Federal scope of eligibility for EA, is permissive or mandatory in nature. The Supreme Court held that it is permissive, allowing each State to make eligibility under its EA program narrower than the scope of § 406(e) eligibility. But the great latitude allowed the States under § 406(e) is not dispositive of this case. It should be kept in mind that the question here is not whether § 406(e) of the Social Security Act, by itself, prohibits discrimination against AFDC recipients in the EA program. Rather, it is whether this Department's duly authorized regulation prohibiting such discrimination is so contrary to the EA statutory provisions and legislative history that a court may overrule the regulation.

Mandley presented the question of whether "a program designed to allow quick, ad hoc responses to immediate needs" should be burdened with "all of the trappings" of a "comprehensive system of income maintenance" in the absence of statutory support and in the face of HHS opposition to that interpretation. 463 U.S. at 744. One should understand the magnitude of problems for State budgeting of EA that would have resulted from a decision in favor of the plaintiffs-appellees in *Mandley*. The Supreme Court showed its concern in this regard at 436 U.S. 745-46. In the immediate case, a finding that New York cannot discriminate against AFDC recipients in its administration of its EA program would not have such a drastic impact on the State's budgetary process, as was the concern of the Court in *Mandley*, because the number of AFDC recipients is much smaller than the number of those who can meet the broad eligibility standard of § 406(e).

Perhaps more importantly, this Court should find 45 C.F.R. § 233.10(a)(1) compatible with the EA program because the legislative history of the EA statute, Public Law 90-248, § 206, provides a strong indication that EA was largely intended to help AFDC recipients. The Senate Report for Public Law 90-248 states the following:

> The committee understands that the process of determining AFDC eligibility and authorizing payments frequently precludes the meeting of emergency needs when a

> crisis occurs. In the event of eviction, or when utilities are turned off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today.
>
> * * *
>
> The eligible families involved are those with children under 21 who either are, or have recently been, living with close relatives. The families do not have to be receiving, or eligible upon application to receive, AFDC (although they are generally of the same type), but they must be without any available resources and the payment or service must be necessary in order to meet an immediate need that would not otherwise be met.

S. Rep. No. 744, 90th Cong. 1st Sess.; 1967 U.S. Code Cong. and Admin. News 3002-03. Analyzing the EA statute and the above language on a previous occasion, the Court of Appeals for the Second Circuit stated that "both the structure of the Act itself and its legislative history show that the EA program was designed to cover, at a minimum, AFDC recipients." *Lynch* v. *Philbrook*, supra at 796. Since the Supreme Court's subsequent decision in *Mandley*, the terms of the EA statute may not require such an extensive conclusion. However, the issue in *Bacon* is different than the one posed in *Mandley*, namely whether the doctrine of "equitable treatment" in § 233.10(a)(1) is compatible with the EA statute and its legislative history. Surely, as seen from the above, § 233.10(a)(1)'s ban on discrimination against AFDC recipients is compatible with the EA law.

Furthermore, § 233.10(a)(1) is not an arbitrary or capricious regulation. It provides a rule of reason that prohibits the States from unreasonably discriminating against individuals or groups contrary to the purposes of the public assistance programs. The close relation of the regulation to the purposes of title IV-A and the EA program, as demonstrated by the legislative history, underscores its reasonable nature.

E. Section 233.10(a)(1) applies to the EA program and prohibits discrimination against AFDC recipients in a State's administration of EA where the discrimination is not tailored to the purposes of EA.

It is well-established that an administrative agency is the most appropriate body to interpret its own regulation. The Supreme Court has put it this way:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.
>
> * * *
>
> [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Bowles v. *Seminole Rock Co.*, 325 U.S. 410, 413-13 (1945). The Social Security Administration, the component of the Department of Health and Human Services which is responsible for the Federal aspect of administering the AFDC and EA programs, has determined that 45 C.F.R. § 233.10(a)(1) applies to the EA program and prohibits New York's discrimination against AFDC recipients.

Section 233.10(a)(1) was intended to apply to the EA program because the regulation was promulgated as part of the Secretary's § 402(a)(5) authority to establish standards necessary for the proper and efficient administration of a State's plan. The Supreme Court stated in *Mandley* that the delegation of § 402(a)(5) applies to the entire State plan, including any EA provision. In discussing *Mandley*, the Supreme Court noted that § 402(a) of the Social Security Act lists various State plan requirements, some of which apply to the plan as a whole and some of which apply only to a portion (such as AFDC or EA) of the plan. The Court listed § 402(a)(5) as a provision that applies to the State plan as a whole. 436 U.S. at 741-42. Since the EA provision is part of the State plan, a general State plan

requirement established by the Secretary under § 402(a)(5) must apply to the EA program as well as to AFDC.

Furthermore, the Social Security Administration has determined that § 233.10(a)(1) prohibits a State from discriminating against AFDC recipients in administering EA unless the discrimination is justified by or tailored to the purposes of the program. For the reasons explained below, we do not believe the discrimination found in the New York law challenged herein is justified by, or tailored to, the purposes of the EA program.

F. New York Social Services Law § 350-j(2)(c) violates 45 C.F.R. § 233.10(a)(1) by discriminating against AFDC recipients without relation to the purposes of the EA program.

New York Social Services Law § 350-j(2)(c) reads as follows:

> 2. For purposes of this section, the term "emergency assistance" means aid, care and services authorized during a period not in excess of thirty days in any twelve month period to meet the emergency needs of a child of the household in which he is living, in the following circumstances:
>
> * * *
>
> (c) in cases of applications for grants of cash assistance, such child or such household is not categorically eligible for or receiving aid to dependent children. . . .

This obviously discriminatory provision against AFDC recipients is reinforced in § 350-j(3) of the same law:

> Such emergency assistance, but not including cash grants, may be furnished to a family eligible for aid to dependent children only in the form of emergency services.

The brief of the defendants-appellees relies upon an explanation by Mr. John Hickey, Director of the Income Support Unit, Division of Income Maintenance, New York Department of Social Services, to the effect that the above-stated provi-

sions do not really discriminate against AFDC recipients. Mr. Hickey states:

> It must be noted that Social Services Law 350-j does *not* discriminate against Aid-for-Dependent-Children recipients. The statute prohibits replacement of *any* public assistance grant that is lost, stolen or mismanaged. This applies equally to Home Relief and Aid-to-Dependent-Children recipients. The statute does prohibit emergency assistance in the form of cash to Aid-for-Dependent-Children recipients. However, the only occasions in which emergency assistance in the form of cash would be provided to a Home Relief recipient would be for those situations in which an Aid-for-Dependent-Children recipient would be eligible for a cash grant as part of the Aid-for-Dependent-Children program. Examples of these situations are set forth in Section 131-a of the Social Services Law such as replacement of furniture and clothing as a result of fire, flood or other like catastrophe. Since cash assistance is provided to *all* public assistance recipients in identical circumstances, there is no discrimination because the source of the cash assistance program is irrelevant to the recipient.
>
> Furthermore, Section 133 of the Social Services Law authorizes temporary preinvestigation grants to *all* public assistance applicants who are in immediate need. Again, there is no discrimination in treatment of Aid-for-Dependent-Children applicants as opposed to applicants for Home Relief.

Page 13 of defendants-appellees' brief (emphasis in the original). Thus, the reasoning of the defendants-appellees is that New York's law does not discriminate against AFDC recipients for two reasons:

> 1. the law discriminates equally against Home Relief recipients and AFDC recipients, and
>
> 2. other laws exist that do not discriminate against AFDC recipients.

The conclusion drawn from these reasons is a non sequitur, and Mr. Hickey's effort does not explain away the discrimination against AFDC recipients that is apparent on the face of the New York statute.

Discrimination against AFDC recipients does not cease to exist with the addition of discrimination against Home Relief recipients in the administration of cash assistance in the EA program. A need exists for emergency cash assistance for AFDC recipients that is not quickly met under the AFDC income maintenance program. That fact was a major impetus for the creation of the EA program, for as noted previously, the Senate Report of the EA statute states that:

> The committee understands that the process of determining AFDC eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs. In the event of eviction, or when utilities are turned off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today.

Sen. Rep. No. 744, 90th Cong. 1st Sess.; 1967 U.S. Code Cong. and Admin. News 3002-03. These provisions appear to be particularly unreasonable since they exclude those who by definition are the very neediest element of society.

Finally, New York's discrimination is not justified by or tailored to the purposes of the EA program. The above-stated quotation from the Senate Report amply demonstrates the inconsistency between such discrimination and the purposes of the EA program. This Court reached the same conclusion in *Lynch* v. *Philbrook,* supra at 796.

For the above reasons it is submitted that § 350-j(2)(c) constitutes an unreasonable and arbitrary classification forbidden by § 233.10(a)(1) of the Secretary's regulations.

II.

NEW YORK SOCIAL SERVICES LAW § 350-j(2)(e), WHICH DENIES EA TO PUBLIC ASSISTANCE RECIPIENTS, INCLUDING AFDC RECIPIENTS, IN ALL CASES OF THEFT OF PUBLIC ASSISTANCE FUNDS BUT WHICH MAKES EA GENERALLY AVAILABLE IN OTHER CASES OF LOSS OR THEFT, VIOLATES 45 C.F.R. § 233.10(a)(1), THEREBY VIOLATING § 402(a)(5) OF THE SOCIAL SECURITY ACT.

Our analysis of the legality of § 350-j(2)(e) is essentially the same as our analysis of § 350-j(2)(c). Both sections unreasonably discriminate against AFDC recipients in the provision of EA services and are therefore prohibited by 45 C.F.R. § 233.10(a)(1). The defendants-appellees mostly follow the same line of defense with respect to both sections, and that defense is equally invalid with respect to both. The plaintiffs-appellants' *Statement of Facts* adequately demonstrates that the facial discrimination of both sections of the New York law has resulted in actual, harmful discrimination against AFDC recipients, contrary to the above-noted assertions of Mr. Hickey.

New York's principal defense with respect to the lost-or-stolen-check provision is that it has a right to protect itself against spurious claims and that it has a right not to take the risk of making two payments to a public assistance recipient who may be cheating. The first problem with this explanation is that the New York law still discriminates against AFDC recipients without any relation to the purposes of the Social Security Act or the EA program. Thus, it still violates § 233.10(a)(1).

Equally important, however, is that upon close examination that explanation appears illogical. The chances of fraud where a person claims to have lost his paycheck or workmen's compensation check are the same as those where a person claims to have lost a public assistance check. To think

otherwise is to indulge in a factually unsubstantiated assumption that welfare recipients are unusually larcenous. To the extent that the State is twice taking a chance on a person's character when public assistance recipients are eligible for EA replacement checks, there is a limited rationality in the discrimination against AFDC recipients. However, the harm to the State causd by the small percentage of those who can twice fool the State into making erroneous payments is dwarfed by the harm caused by the automatic denial of EA to the vast majority of honest AFDC recipients who have the most desperate need for help. Therefore, the Secretary of HHS made the decision that such discrimination is unlawful except where consistent with the aims of the public assistance titles. If New York is to continue to accept Federal funding for 50% or more of its AFDC and EA programs, then it must abide by the reasonable rulemaking which the Secretary has enacted in 45 C.F.R. § 233.10(a)(1). The Congress has clearly authorized the Secretary to make such a rule by its passage of § 402(a)(5) of the Social Security Act.

Conclusion

For the above-stated reasons, this Court should find that New York Social Services Law §§ 350-j(2)(c) and (e) violate 45 C.F.R. § 233.10(a)(1) and are therefore invalid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 1981, I served the foregoing Brief of the Secretary of Health and Human Services as Amicus Curiae upon the parties to this action, by causing to be mailed, postage prepaid, to:

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/s/ RICHARD W. HUBBARD

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-770

BARBARA BLUM, as successor in office to PHILIP L. TOIA, sued individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

-against-

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated, FREDDIE MAE GOODWINE, LINDA SELDERS and GERTRUDE PARRISH; CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Appellees.

On Appeal From the United States Court of Appeals

For the Second Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The appellees in the above captioned action ask leave to file their Motion to Affirm pursuant to Rule 46 in forma pauperis.

Affidavits of appellees in support of this motion are attached hereto.

Leave to proceed in forma pauperis was not sought in any court below.

Martin A. Schwartz

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On Appeal From the United States Court of Appeals
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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, FREDDIE MAE GOODWINE, being first duly sworn according to law, depose and say that I am an appellee in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to the cost of prosecuting the appeal are true.

1. Are you presently employed?

No

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

No

3. Do you own any cash or checking or savings account?

No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

GREGORY A. GOODWINE, SON
TANYA N. GOODWINE, DAUGHTER

I understand that a false statement to any question in this affidavit will subject me to penalties for perjury.

Freddie Mae Goodwine
FREDDIE MAE GOODWINE

Sworn to before me this
13th day of November, 1981.

Richard Peyton Whiteley

RICHARD PEYTON WHITELEY
Notary Public, State of New York
No. 60-4616984
Qualified in Westchester County
Commission Expires March 30, 1983

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On Appeal From the United States Court of Appeals
For the Second Circuit

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) SS:

MARTIN A. SCHWARTZ, ESQ., being duly sworn, deposes and says that:

1. I am an attorney duly admitted to practice before this Court. I am associated with Westchester Legal Services, Inc., attorney for appellees in the above entitled appeal. I make this affidavit in support of appellees' motion to proceed in forma pauperis.

2. The appellees in this case are all individuals who claimed that they were entitled to Emergency Assistance because they became destitute as the result of the loss or theft of their public assistance grant. (42 U.S.C. §606(e); N.Y. Social Services Law, §350-j). All of the appellees were recipients of public assistance when this action was commenced. They have been represented throughout this action by Westchester Legal Services, Inc., a non-profit organization which exists for the purpose of providing legal representation in civil matters to indigents.

WHEREFORE, your deponent respectfully prays that this Court grant appellees' motion to proceed in forma pauperis.

Martin A. Schwartz

MARTIN A. SCHWARTZ

Sworn to before me this
17th day of November, 1981.

Kathleen S. Jones

KATHLEEN SUSANNE JONES
Notary Public, State of New York
No. 60-4614006
Qualified in Westchester County
Commission Expires March 30, 19[illegible]

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On Appeal From the United States Court of Appeals
For the Second Circuit

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) SS:

Meryl Goldin, being duly sworn, deposes and says that:

I am over the age of 18 years and I am not a party to this action and I reside at Purchase, NY 10577.

That on November 17th, 1981, deponent served the annexed Motion for Leave to Proceed In Forma Pauperis on Honorable Robert Abrams, Attorney General of the State of New York, attorney for Appellant in this action at Two World Trade Center, New York, New York 10047; the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the state of New York.

Meryl Goldin

Sworn to before me this
17th day of November, 1981.

Martin A. Schwartz

MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 03-3555455
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Certificate filed in New York County
Commission Expires March 30, 1983

Appellant's Reply Brief

No. 81-770

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO MOTION TO AFFIRM

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No. 81-770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BARBARA BLUM, as successor in office to PHILIP L. TOIA, sued individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

against

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated, FREDDI MAE GOODWINE, LINDA SELDERS and GERTRUDE PARISH; CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO MOTION TO AFFIRM

INTRODUCTION

This brief is submitted in reply to the arguments set out in appellees' motion to affirm the judgment below.

I.

Appellees have failed to meet appellant's argument (J.S. 11-12) that New York Social Services Law § 352-j(2)(c), which denies cash Emergency Assistance to AFDC recipients, does not, as a matter of fact, discriminate against these public assistance recipients. The constitutionality of § 352-j(2)(c) was decided by the lower courts without benefit of any discovery or affidavit evidence from appellees. Thus, appellant's affidavit stands uncontroverted. However long one may argue the interpretation of the statute, as appellees attempt to do, it cannot cure the fundamental error of the lower courts: the grant of summary judgment where issues of fact remain unresolved.

II.

Appellees concede (Motion to Affirm p. 17, fn.) that at least 1/2 of 1% of public assistance cases show evidence of fraud. This would involve at least $6,000,000 per month in suspect payments.* Government may not ignore this

*According to the lastest published statistics, covering 1980, nationwide public assistance payments for December, 1980 totalled $1,244,104,000. One half of one percent of this amount would total $6,220,520; $74,646,240 on an annual basis. Emergency Assistance payments for December, 1980 totalled $10,253,000. One half of one percent of this amount would be $51,265 or $617,180 if annualized. Emergency Assistance is the fastest growing public welfare program, having increased in volume by 35.9% over 1979. Given this rate of increase, the dollar amount of suspect Emergency Assistance payments must be assumed larger than the 1980 figure. See, "Public Assistance Statistics, December, 1980, p. 9 (U.S. Dept. of Health and Human Services, Social Security Administration, November, 1981). (Footnote continued next page).

*Footnote continued from preceding page

In 1980, New York State spent $1,844,000 in Emergency Assistance for adults. Emergency Assistance to Families, under which the AFDC clients would apply, totalled $35,400,000. See, 1980 Annual Report, New York State Dept. of Social Services, p. 22.

incidence of fraud; at stake is the political acceptability of welfare to the taxpaying public.

While we do not dispute appellees' contention (Motion to Affirm, p. 16) that rich and poor are, as a group, equally honest, it is an equally safe assumption that more rich persons than poor ones engage in tax fraud and that proportionately more welfare recipients than recipients of paychecks would attempt to defraud the Emergency Assistance Program of cash by falsely alleging a lost or stolen check if only because welfare clients have the requisite familiarity with the public assistance system.* Thus, the different treatment

*Hence the fallacy in the statement by HHS quoted by appellees (Motion to Affirm, p. 17) that "The chances of fraud where a person claims to have lost his paycheck or workmen's compensation check are the same as those where a person claims to have lost a public assistance check." This facile generalization overlooks the opportunities provided by an ongoing relationship with the system.

of welfare and non-welfare recipients in this context is clearly justified, see, e.g., Barry v. Barchi, 443 U.S. 55, 67-68 (1979); Vance v. Bradley, 440 U.S. 93, 98-99 (1979); at least the rational standard is met, which is all that the law requires (Dandridge v. Williams, 397 U.S. 471 [1970]). Cases relied upon by appellees that hold it to be a denial of equal protection to treat differently two classes of people who are equally prone to commit fraud (Motion to Affirm, pp. 14-17) simply beg the question.

Appellees protest in vain that there is no conflict between the Second Circuit in this case and the Seventh Circuit in Mandley v. Quern, 635 F.2d 759, 761 (1980). The whole tenor of the Seventh Circuit opinion, acknowledging that loss or theft of cash is "often impossible to verify" in the brief period within which the state must process an application for

Emergency Assistance, see, Quern v. Mandley, 436 U.S. 724, 736 (1970), hence Emergency Assistance may be denied on this basis is a far cry from the holding of the Court below. It is of no consequence that the lost or stolen cash in this case is derived from public assistance checks since the classification of public assistance clients is a rational one.

By substituting its judgment on how to deal with the problem of verifying alleged loss of welfare check proceeds for that of the Legislature (J.S. 19a), the Second Circuit departed from settled law which vests the states with the discretion to determine its public welfare priorities, Dandridge v. Williams, supra, 397 U.S. at 485; Quern v. Mandley, supra, 436 U.S. at 740, n. 16.

III.

Appellees' contention that they should prevail because the Second Circuit erroneously decided the Supremacy Clause issue (Motion to Affirm, pp. 21-26) is not properly before this Court due to appellees' failure to cross-appeal.

The general rule relied upon by appellees, Id. pp. 21-22, which allows a party to urge any ground in support of the affirmance of a judgment, whether or not accepted by the court below, does not apply to their Supremacy Clause argument. Were they to prevail on this point, the injunction granted below on the basis of constitutional right would be modified to one based upon statute or regulation. Thus, the relief granted below could be overturned merely by amending the Social Security Act or even by fiat of the Secretary of Health and Human Services. Since a cross-appeal is required to urge modification of a judgment, even where the

modification would provide less relief to the appellee, Federal Energy Commission v. Algonquin SNG Inc., 426 U.S. 548, 560, n. 11 (1976); see also: County of Los Angeles v. Davis. 440 U.S. 625, 630, n. 3 (1979); Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, 92 n. 2 (1978) and Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 n. 4 (1970), the Supremacy Clause issue should not be considered.

Assuming, arguendo, that the Court were to consider the merits of this argument, appellant submits that it should be rejected as being at variance with Quern v. Mandley, 436 U.S. 725 (1978). Congress set the outer limits of eligibility, leaving the states to determine what "emergencies" would be covered, Id., 436 U.S. at 741-747. Plans, such as New York's which "exclude AFDC recipients if the emergency need is one theoretically covered by the basic assistance grant" are therefore clearly authorized by the

statute (J.S. 10a). As the Second Circuit pointed out, ibid. to hold otherwise would ignore this Court's ruling in Quern v. Mandley.

Appellees cannot rely upon the argument in the brief for the Secretary of Health and Human Services, amicus curiae, dated January 14 1981, submitted to the Court of Appeals, that the Secretary's regulation which prohibits inequitable treatment of individuals or groups, 45 C.F.R. § 233.10(a)(1), pre-empts the disputed statute.* The statutory authority for the regulation, Social Security Act § 402(a)(5), authorizes the promulgation of "housekeeping" regulations, Quern v. Mandley, supra, 436 U.S. at 742. Even if

*It is noteworthy that the Government has not, to date, intervened in this appeal to press the point upon this Court.

the Secretary had intended these regulations to be of substantive character, this would have been beyond the scope of his statutory authority, Cf. Batterton v. Francis, 432 U.S. 416, 426 (1977); Cf. Schweiker v. Gray Panthers, ___U.S.___, 101 S.Ct. 2633, 2640 (1981).

As applied by appellees, 45 C.F. R. § 233.10(a) adds nothing to the case except a restatement of the general, "equal protection language" of the Fourteenth Amendment. The issues at bar are not a matter of agency expertise to which the doctrine of judicial deference, expressed in such cases as Batterton and Gray Panthers, is applicable; rather, they are questions of law within the special competency of the courts.

CONCLUSION

APPELLEES' MOTION TO AFFIRM SHOULD BE DENIED AND PROBABLE JURISDICTION NOTED.

Dated: New York, New York
December 3, 1981

Respectfully submitted,

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Appellant's Brief

No. 81-770

Office, Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1981

BARBARA BLUM, as successor in office to PHILIP L. TOIA, sued individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

against

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated, FREDDIE MAE GOODWINE, LINDA SELDERS and GERTRUDE PARISH,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

---

BRIEF FOR APPELLANT

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Question Presented

Do the provisions of the New York statute [Social Services Law § 350-j(2)(c) and (e) and (3)] denying emergency cash assistance to recipients of Aid to Families with Dependent Children (42 U.S.C. § 601, *et seq.*) violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution?

Parties

The parties to this appeal are set forth in the caption. The Westchester Commissioner of Social Services was a defendant in the lower courts, although he did not actively participate in the proceedings in the Court of Appeals (8-9a).* Notice pursuant to Supreme Court Rules, Rule 10.4 that it was believed that the County Commissioner had no interest in the outcome of this appeal was included in the notice of appeal (JS 51a). In the absence of any indication from him to the contrary, the County Commissioner has been omitted from the caption of this brief.

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* Numbers in parentheses followed by "a" refer to pages of the Joint Appendix. References to the appendix to the Jurisdictional Statement are indicated "(JS a)".

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"Public Assistance Statistics," December, 1980, p. 9 (U.S. Dept. of Health and Human Services, November, 1981) ..... 19, f.n.

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Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR APPELLANT

Opinions Below

The order of the Court of Appeals for the Second Circuit denying rehearing is unpublished and is reproduced in the Appendix to the Jurisidictional Statement, JS 1a. The opinion of the Court of Appeals is published at 648 F.2d

801; it is reproduced at page JS 3a. The opinion of the District Court for the Southern District of New York is published at 493 F. Supp. 865; it is reproduced at JS 22a.

The lower courts also rendered the following opinions on non-constitutional issues which are not before the Court on this appeal.* Endorsed memorandum of the District Court dated July 1, 1977, denying defendant State Commissioner's motion to change venue [unpublished and noted on the docket at 2a)]; opinion of the District Court granting summary judgment to plaintiffs, published at 437 F. Supp. 1371 (121a); summary affirmance of the Court of Appeals noted at 580 F.2d 1044 (155a); decision of the Court of Appeals dated August 21, 1978 granting defendant State Commissioner's petition for rehearing and remanding to the District Court for consideration of the case in the light of *Quern* v. *Mandley*, 436 U.S. 725 (1978) (157a) (unpublished); opinion of the District Court dated January 30, 1979 granting summary judgment to defendants on the plaintiffs' "Supremacy Clause" claim (unpublished) (175a).

Jurisdiction

This action was brought pursuant to 42 U.S.C. § 1938; 28 U.S.C. § 1343(3) to enjoin the enforcement of New York Social Services Law § 350-j(2), (c), (e), (f), (3) as unconstitutional and/or contrary to the Federal Social Security Act.

---

* Despite their failure to cross-appeal, appellees attempted to raise a "Supremacy Clause" issue in their Motion to Affirm. For the reasons stated in appellant's Reply to Motion to Affirm, pp. 8-11, this point is not properly before the Court and, in any event, is not well taken.

The judgment of the Court of Appeals was entered on May 4, 1981. The order of the Court of Appeals denying rehearing was entered on July 22, 1981. The notice of appeal was served on October 2, 1981 and filed in the U.S. Court of Appeals for the Second Circuit on October 5, 1981. The appeal was docketed on October 20, 1981.

The jurisdiction of this Court to entertain this appeal rests on 28 U.S.C. § 1254(2). Probable jurisdiction was noted on December 14, 1981.

Constitutional and Statutory Provisions Construed

U.S. Constitution, Amendment XIV, § 1, provides in pertinent part:

> "* * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the United States of America (House Document No. 93-414, 93rd Congress, 2d Session, p. 21 [1975]).

New York Social Services Laws provides in pertinent part:

> § 350-j. The emergency assistance to needy families with children.
>
> 1. Any inconsistent provisions of this chapter or of any other law notwithstanding, so long as federal aid is available therefor, a social services district shall provide emergency assistance as herein defined to persons eligible, including migrant workers and their families.

2. For purposes of this section, the term "emergency assistance" means aid, care and services authorized during a period not in excess of thirty days in any twelve month period to meet the emergency needs of a child or the household in which he is living, in the following circumstances:

(a) where the child is under twenty-one years of age; and

(b) the child is living with, or within the previous six months has lived with, one or more persons specified in subdivision b of section three hundred forty-nine of this chapter; and

(c) in cases of applications for grants of cash assistance, such child or such household is not categorically eligible for or receiving aid to dependent children; and

(d) such emergency needs resulted from a catastrophic occurrence or from a situation which threatens family stability and which has caused the destitution of the child and/or household; and

(e) such occurrence or situation could not have been foreseen by the applicant, was not under his control and, in the case of a person receiving public assistance, did not result from the loss, theft or mismanagement of a regular public assistant grant; and

(f) the emergency grant being applied for will not replace or duplicate a public assistance grant already made under section one hundred thirty-one of this chapter.

3. Emergency assistance to needy families with children shall be provided to the extent of items of need and services set forth in sections one hundred thirty-one and one hundred thirty-one-a of this chap-

ter, and items of medical services set forth in section three hundred sixty-five-a of this chapter, and in amounts set forth in the regulations of the department for children who are without available resources, and when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home, and such destitution or such need did not arise because such children or relatives refused without good cause to accept employment or training for employment. *Such emergency assistance, but not including cash grants, may be furnished to a family eligible for aid to dependent children only in the form of emergency services, and so long as federal aid remains available, for emergency fuel grants in the form of vendor restricted payments.*

[4 Repealed.]

5. In scheduling investigations concerning applications for emergency assistance pursuant to this section local social services districts shall give priority to such applications. As emended, L 1977, c 77, §§ 10, 11; L 1978, c 473, §8. (Emphasis added.)

McKinney's New York Social Services Law (1980-81 Supplement), pages 122-123.

§ 131-a Monthly grants and allowances of public assistance.

* * *

6. Nowithstanding any other provisions of this chapter or other law, a special services official may make provisions for the following items and services:

(a) replacement of necessary furniture and clothing for persons in need of public assistance who have suffered the loss of such items as the result of fire, flood or other like catastrophe, provided provision therefor cannot otherwise be made;

(b) purchase of necessary and essential furniture required for the establishment of a home for persons in need of public assistance, providing provision therefor cannot otherwise be made;

* * * *

(d) day care in a day care center, in a family home or provided "in home day care" provided the homemaker is employed, receiving occupational training, physically or mentally incapacitated, or in cases where family duties away from home necessitate her temporary absence. * * *

* * *

McKinney's New York Social Services Law (1976), pages 217-218).

Title 18, New York Codes, Rules & Regulations (NY CRR) § 372.2(a) provides:

372.2 Eligibility. (a) Emergency assistance shall be provided *immediately* by a social services district to or on behalf of a needy child under the age of 21 and any other member of the household in which he is living if the conditions set forth in section 372.1 of this Part are met, * * *. (emphasis added)

18 NYCRR p. 254.11 SS 9-30-79.

Statement of the Case

Appellees and the class they represent are recipients of Aid to Families with Dependent Children (AFDC), see 42 U.S.C. § 601, *et seq.*, N.Y. Social Services Law § 131-a, who were denied Emergency Assistance (EA), 42 U.S.C. § 606(e), in cash, because the implementing New York State statute, N.Y. Social Services Law § 350-j, rendered appel-

lees, as AFDC recipients, ineligible for such cash assistance (although eligible for "items of need" and services), *id.* § 350-j(2)(c) and (3). The law also precluded EA when the "emergency" resulted from the loss, theft, mismanagement or duplication of a public assistance grant, *id.* § 350-j (2)(e), (f). Since the "emergency" in this case resulted from the alleged loss or theft of the proceeds of appellees' welfare checks (14-16a, 59-64a, 97-98a), they were disqualified by these provisions, as well.

Appellees brought this action pursuant to 42 U.S.C. § 1983; 28 U.S.C. § 1343(3) to enjoin N.Y. Social Services Law § 350-j(2)(c), (e), (f) and (3), as being in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Federal Social Security Act (10-11a, 55-56a).

As required by this Court's ruling in *Hagans* v. *Lavine,* 415 U.S. 528, 543-544 (1974), the District Court first addressed the issue of whether the State statute conflicted with the Federal Social Security Act and was therefore in violation of the Supremacy Clause, U.S. Const., Art. VI, § 2 (133-136a).

After certifying this suit to be a class action (136-144a), the District Court granted plaintiffs summary judgment on the "Supremacy Clause" issue (144-154a). The Court of Appeals affirmed on the opinion of the District Court (155a). Because of the pendency before this Court of *Quern* v. *Mandley,* 436 U.S. 725 (1978), the State Commissioner moved for rehearing or rehearing *in banc.* After *Quern* was decided, the Court of Appeals, on August 21, 1978, in an unpublished opinion, granted the petition for rehearing,

recalled its decision and vacated the judgment of the District Court. It remanded the case for consideration in the light of *Quern* and to determine any other issues that might remain in the case (157a).

Both the State and County Commissioners moved the District Court to reconsider its grant of summary judgment to the plaintiffs or alternatively, for summary judgment in their favor (159, 5a).

In support of his motion, the State Commissioner offered the affidavit of John Hickey, Director of the Income Support Unit, Division of Income Maintenance, New York State Department of Social Services (161a). Mr. Hickey explained that the State's policy was to

> "take advantage of Federal funds to respond to emergency situations. The statute was not intended to serve as a supplement to the [regular] public assistance grant nor serve as an insurance policy in the event a public assistance grant was lost, stolen or mismanaged." *ibid.*

In furtherance of this policy, noted Mr. Hickey, the Department's regulations had been amended to so provide, *ibid.* These amendments were approved by the United States Department of Health, Education and Welfare (HEW) (161-162a). Over a year later, HEW's Regional Attorney advised the Department of Social Services that replacement of stolen cash was optional under the Emergency Assistance program (162a).

When the New York Court of Appeals, in *Jones* v. *Berman*, 37 NY2d 42, 332 N.E.2d 303, 371 N.Y.S. 2d 422 (1975), found these regulations to be beyond the scope of State

statutes, the Department of Social Services sponsored the legislation at bar, which accomplished what the New York Court said could not be done by regulation alone, *ibid.*

In describing the effect of these amendments to § 350-j, Mr. Hickey said:

> "It must be noted that Social Services Law 350-j does *not* discriminate against Aid-for-Dependent-Children recipients. The statute prohibits replacement of *any* public assistance grant that is lost, stolen or mismanaged. This applies equally to Home Relief* and Aid-to-Dependent-Children recipients. The statute does prohibit emergency assistance in the form of cash to Aid-for-Dependent-Children recipients. However, the *only* occasions in which emergency assistance in the form of cash would be provided to a recipient of Home Relief would be for those situations in which an Aid-for-Dependent-Children recipient would be eligible for a cash grant as part of the Aid-for-Dependent-Children program. Examples of these situations are set forth in Section 131-a of the Social Services Law such as replacement of furniture and clothing as a result of fire, flood or other like catastrophe. Since cash assistance is provided to *all* public assistance recipients in identical circumstances, there is no discrimination because the source of the cash assistance program is irrelevant to the recipient."
>
> "Furthermore, Section 133 of the Social Services Law authorizes temporary preinvestigation grants to *all* public assistance applicants who are in immediate need. Again, there is no discrimination in treatment of Aid-for-Dependent-Children applicants as opposed to applicants for Home Relief." (163a). (Emphasis in original)

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* New York's residual, non-federal public assistance program, N.Y. Social Services Law § 157.

This factual description of how § 350-j operates in practice, in conjunction with other provisions of the law, was never controverted in any opposing affidavit.

On January 30, 1979, the District Court resolved the Supermacy Clause issue in favor of the defendants on the authority of this Court's decision in *Quern* v. *Mandley, supra* (175, 177-178a). It then took additional submissions by the parties on the Equal Protection issues.

In its decision of June 23, 1980 (JS 22a), the District Court held that there was no basis or justification shown for the blanket disqualification of AFDC recipients from cash EA [§ 350-j(2)(c)]. In doing so, it rejected the State's contention that AFDC recipients were, in fact, treated identically with other persons (JS 37-39a). However, the District Court held that the difficulty in verifying claims of lost or stolen cash was a sufficient rationale for excluding such occurrences from the scope of the EA program [§ 350-j(2)(e)] (JS 40-43a). The District Court also upheld the statutory denial of EA to replace or duplicate a public assistance grant as a means of limiting EA to specific crisis situations and to prevent EA from becoming a source of supplemental income to public assistance recipients [§ 350-j(2)(f)] (JS 43-44a).

Both appellees (plaintiffs) and the State Commissioner appealed from the judgment of the District Court to the Court of Appeals for the Second Circuit to the extent it was unfavorable to them.*

* Appellees abandoned their appeal from that portion of the judgment as upheld the non-duplication clause, N.Y. Social Services Law § 350-j(2)(f). The State Commissioner's cross-appeal included the question of the validity of that portion of the District Court's judgment as extended appellees' time to move for counsel fees under 42 U.S.C. § 1988 (JS 8, 20-21a). This issue is not before the Court on this appeal.

The Court of Appeals for the Second Circuit affirmed the District Court's ruling on the Supremacy Clause issues pressed by the appellees, upholding the District Court's application of *Quern* v. *Mandley, supra,* to the case at bar (JS 9-13a). No cross-appeal has been taken from that portion of the Court of Appeals' ruling. Consequently, the Supremacy Clause issue is not now before the Court.*

The Circuit also upheld the District Court in its rejection of the State's interpretation of N.Y. Social Services Law § 350-j(2)(c) and (3), despite the failure of the appellees to controvert its affidavit and other documents by evidentiary material. It agreed with the District Court that the State's presentation had not satisfied it that treatment of AFDC and non-AFDC applicants was equivalent (JS 14-17a).

However, the Court of Appeals reversed the District Court's holding that denial of EA because of the loss or theft of the proceeds of a public assistance grant was a reasonable classification under the Equal Protection Clause. It rejected the District Court's conclusion that such a loss is virtually impossible to verify, and in any event, that such verification would be expensive and time consuming. The Circuit Court read N.Y. Social Services Law § 350-j(2)(e) as establishing a presumption that proverty and immorality were synonymous (JS 18a) and rejected the considerations of administrative efficiency approved by the District Court (JS 19a).

The State Commissioner petitioned for rehearing, with a suggestion for rehearing *in banc.*

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* See footnote to "Opinions Below", p. 2, *supra.*

The petition cited the conflict between the Second Circuit's opinion herein and that of the Seventh Circuit in *Mandley* v. *Quern*, 635 F.2d 659 (1980), which upheld as rational and thus, constitutional, an Illinois statute denying EA for lost or stolen cash "because it is often impossible to verify", 635 F.2d at 661.

The petition also pointed out that even if the Court of Appeals was unconvinced as to the State's interpretation of N.Y. Social Services Law § 350-j(2)(c) and (3), it should not have made a factual determination that AFDC recipients were treated differently from other welfare recipients in view of appellees' failure to controvert the State's evidence. It also pointed out the anomaly in the Circuit's opinion caused by appellees' failure to press its appeal from the District Court's ruling on § 350-j(2)(f). In forbidding duplication of a grant, § 350-j(2)(f) would allow the State to deny EA in the same circumstances it would be withheld under § 350-j(2)(c) and (3), which latter provisions the Court of Appeals held to be a constitutional violation.

The petition for rehearing was denied (JS 1a).

An appeal was taken to this Court, which noted probable jurisdiction on December 14, 1981, —— U.S. ——, 50 U.S. Law Week 3486.

Summary of Argument

New York Social Services Law § 350-j(2)(c), (e), (3) should be sustained as in accord with the Equal Protection clause of the Fourteenth Amendment under the "rational basis" test, *Califano* v. *Aznavorian*, 439 U.S. 170, 174-175 (1978); *Weinberger* v. *Salfi*, 422 U.S. 749, 776-777 (1975); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). The lower courts erred in judging the State by a stricter standard. Specifically, they disregarded uncontroverted evidence that all welfare recipients applying for Emergency Assistance are treated alike. They also erred in striking down the prohibition of the replacement of lost or stolen public assistance grants; such prohibition is a reasonable means of excluding fraudulent claims, *Weinberger* v. *Salfi, supra*, 422 U.S. at 776-777. Moreover, this provision is a reasonable legislative choice as to what emergencies should be ameliorated under the Emergency Assistance program, *Dandridge* v. *Williams, supra*, and as a means of preventing Emergency Assistance from becoming merely a supplement to the other welfare categories.

ARGUMENT

N.Y. Social Services Law § 350-j is a rational exercise of the State Legislature's power to set priorities for public assistance and to protect the welfare system from fraud.

The doctrine that social welfare legislation does not violate the Equal Protection Clause of the Fourteenth Amendment when there is a rational basis for the legislative judgment is so well established in the decisions of this Court, that one risks the appearance of triteness in its repetition. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. 170, 174-175, 178 (1978); *Mathews* v. *DeCastro*, 429 U.S. 181, 185 (1976); *Lavine* v. *Milne*, 424 U.S. 577 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 776-777 (1975); *Hagans* v. *Lavine*, 415 U.S. 528, 529 (1974); *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972); *Richardson* v. *Belcher*, 404 U.S. 78, 84 (1971); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). Unfortunately, the State of New York is obliged to ask this Court to reiterate this doctrine, for, despite its claim that it applied this principle (JS 13-14a), the Court of Appeals clearly held the State to a different and higher standard.

A.

In support of his motion in the District Court for reconsideration or summary judgment, appellant submitted the affidavit of John Hickey, an official of the New York State Department of Social Services who is the Director of its Income Support Unit, Division of Income Maintenance (161a). Mr. Hickey stated that contrary to the contentions accepted by the lower courts, (145a, JS 38a, JS 14-16a),

AFDC recipients, such as appellees, and Home Relief recipients were treated alike when applying for Emergency Assistance To Needy Families With Children. Mr. Hickey pointed out that, like AFDC recipients, Home Relief recipients could not receive EA to replace a lost, stolen or mismanaged public assistance grant; and, that the only circumstances under which a Home Relief recipient would receive cash EA were those circumstances in which AFDC recipients would receive a cash grant under the AFDC program. Examples are set out in N.Y. Social Services Law § 131-a(6), such as replacement of furniture or clothing lost as a result of fire, flood or similar disaster. Moreover, all public assistance applicants in immediate need could receive temporary preinvestigation grants (163a).

Although the Hickey affidavit is the only evidence in the record as to how AFDC recipients and eligibles are actually affected by the "no cash" provisions of N.Y. Social Services Law § 350-j(2)(c), (3), both the District Court (JS 37-39a) and the Court of Appeals (JS 15-17a) ignored it; the District Court not even bothering to refer to this portion of the Hickey affidavit, *ibid.*

In view of the utter failure of appellees to impeach the Hickey affidavit by competent evidence, see Fed. R. Civ. P., Rule 56(e), the lower courts were obliged to accept the State's description as to how, in fact, the statute worked, *Quern* v. *Mandley*, 436 U.S. 725, 738 (1978) and *N.Y. State Dep't of Social Services* v. *Dublino*, 413 U.S. 405, 421 (1973), in which this Court stated:

> "In interpreting this statute, we must be mindful that 'the construction of a statute by those charged with

its execution should be followed unless there are compelling indications that it is wrong . . . .' *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969); *Dandridge* v. *Williams*, 397 U.S. at 481. In this case, such indications are wholly absent."

If the statutes in question seemed ambiguous or inartfully drawn, see *Schweiker* v. *Gray Panthers*, 451 U.S. ——; 101 S. Ct. 2633, 2640 (1981), it was all the more reason to defer to the administrative interpretation. Yet the lower courts failed to do this, with the Court of Appeals proceeding to condemn the statute on a dubious reading of state authority. Of the cases it cited as not permitting cash assistance to AFDC recipients under § 131-a(6) (JS 17a), *Howard* v. *Wyman*, 28 N.Y.2d 434, 438 n. 3, 271 N.E.2d 528, 530, n. 3, 322 N.Y.S.2d 683, 686, n. 3 (1971), suggested EA *was* available; in both *Nazario* v. *New York Commissioner of Social Services*, 37 A.D.2d 630, 323 N.Y.S.2d 618, 619 (2d Dept. 1971), decided before the amendments to § 350-j were enacted and *Orr* v. *Shang*, 66 A.D.2d 784, 410 N.Y.S.2d 654, 655 (2d Dept. 1978), decided thereafter, the courts held that AFDC recipients *should* receive EA as a result of an event held not covered by N.Y. Social Services Law § 131-a (6). Thus, the Hickey affidavit and the generous application of the AFDC program it espoused therein is supported by the very cases cited by the Second Circuit. Moreover, the Court of Appeals misread the reference in Hickey's affidavit to § 131-a(6) as stating this was the only instance where AFDC clients would receive a cash grant instead of its merely being one example where such assistance is granted. Had there been any doubt in the minds of the lower courts as to the operation of N.Y. Social Services Law § 350-j, their clear duty was to abstain in favor of a definitive inter-

pretation by the New York Court of Appeals, which has never determined the issue at bar, *Bellotti* v. *Baird*, 428 U.S. 132, 146-147 (1976); *Carey* v. *Sugar*, 425 U.S. 73, 78-79 (1976).

What appellees are actually complaining about is that the statute forbids the duplication of that portion of the public assistance client's regular grant which has been lost or stolen, the subject of the case at bar. The appellees' situation illustrates how, often, N.Y. Social Services Law § 350-j(2)(c), (3) [the "no cash" provision], (2)(e) [the "loss, theft or mismanagement" provision] and (2)(f) [the non-duplication provision] are redundant, a redundancy that was noted by the District Court (137-138a). Apart from the impossibility of verification of such claims [§ 350-j (2)(e)], see § B, *infra*, the denial of a duplicate grant [§ 350-j(2)(f)], is clearly justified as a means of preventing the EA program from becoming, contrary to the intent of Congress, § C, *infra*, merely a supplement to regular public assistance.

It is noteworthy that the District Court upheld § 350-j (2)(f) and that appellees withdrew their appeal from that portion of the decision. The reason stated for such withdrawal (Motion to Affirm, p. 14, fn.) is implausible in view of the District Court's explicit statement that a welfare recipient "cannot receive both a monthly welfare check and an emergency aid grant to cover identical needs" (JS 44a).

B.

Although the Court of Appeals paid lip-service to the undeniable interest of the State in guarding against spurious claims, *Jiminez* v. *Weinberger*, 417 U.S. 628, 636 (1973); *Shapiro* v. *Thompson*, 394 U.S. 618, 637 (1969) (JS 18a),

in striking down § 350-j(2)(e) it proceeded to substitute its judgment for that of the New York Legislature, which has undisputed power to establilsh what needs are provided for by public welfare, *Quern* v. *Mandley, supra,* 436 U.S. at 738, as how to best achieve the goal of providing swift, emergency aid to those who the Legislature determines are deserving, *id.,* 436 U.S. at 744.

The Second Circuit's error is demonstrated by *Weinberger* v. *Salfi, supra,* 422 U.S. at 776-777, in which the Court upheld the denial of Social Security survivor's benefits to most widows who were married to the decedent less than nine months at the time of death, as a means of excluding those who married dying men in order to collect benefits from the Government. In holding that that statute met the rational basis test of *Dandridge* v. *Williams, supra* and *Richardson* v. *Belcher, supra,* this Court pointed out that:

> "Under those standards, the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions, and would be directly contrary to our holding in *Mourning, supra.* Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Id.,* at 777.

The situation in *Salfi* is constitutionally indistinguishable from this case. The New York Legislature directed that local agencies give priority to EA applications, N.Y. Social Services Law § 350-j(5), and the regulations of the Department of Social Services require local districts to act "immediately," 18 NYCRR § 372.2. Under such circumstances, without the prophylactic rule of § 350-j(2)(e)—however "imprecise," *Weinberger* v. *Salfi, supra,* 422 U.S. at 777—local officials would often be faced with claims for lost or stolen cash that would be impossible to verify, see affidavit of Hickey, *supra* (162a) and *Mandley* v. *Quern,* 635 F.2d 659, 661 (7th Cir. 1980).

Appellees concede (Motion to Affirm, p. 17, fn.) that at least ½ of 1% of public assistance cases show evidence of fraud. This would involve at least $6,000,000 per month in suspect payments.* Government may not ignore such incidence of fraud; at stake is the political acceptability of welfare to the taxpaying public. This, we submit, was clearly cause for legislative concern and justification for the different treatment of welfare and non-welfare EA appli-

* According to the latest published statistics, covering 1980, nationwide public assistance payments for December, 1980 totalled $1,244,104,000. One half of one percent of this amount would total $6,220,520; $74,646,240 on an annual basis. Emergency Assistance payments for December, 1980 totalled $10,253,000. One half of one percent of this amount would be $51,265 or $617,180 if annualized. Emergency Assistance is the fastest growing public welfare program, having increased in volume by 35.9% over 1979. Given this rate of increase, the dollar amount of suspect Emergency Assistance payments must be assumed larger than the 1980 figure. See, "Public Assistance Statistics," December, 1980, p. 9 (U.S. Dept. of Health and Human Services, Social Security Administration, November, 1981). In 1980, New York State spent $1,844,000 in Emergency Assistance for Adults. Emergency Assistance to Families, under which the AFDC clients would apply, totalled $35,400,000. See, 1980 Annual Report, New York State Dept. of Social Services, p. 22.

cants, *Barry* v. *Barchi*, 443 U.S. 55, 67-68 (1979); *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979).

While we do not dispute appellees' contention (Motion to Affirm, p. 16) that rich and poor are, as a group, equally honest, it is a safe assumption that just as more rich persons than poor ones engage in tax fraud, proportionately more welfare recipients than recipients of paychecks would attempt to defraud the Emergency Assistance program of cash by falsely alleging a lost or stolen check. This is so if only because welfare clients are already familiar with the public assistance system; and a client's ongoing relationship with the system provides a "greater potential for fraud" (*Jiminez* v. *Weinberger*, 417 U.S. at 636-637).

It is of no consequence that § 350-j(2)(e) will exclude some EA applicants who, in fact, have suffered the loss or theft of cash. As this Court pointed out in the *Salfi* case, the wisdom of taking a particular prophylactic approach is to be determined by the legislative branch; the challenged provisions facilitate assistance to a substantial number of clearly eligible applicants; and they are a proper means of avoiding a diversion of limited resources to administrative functions such as individual determinations, under extraordinary time pressures, N.Y. Social Services Law § 350-j(5); 18 NYCRR § 372.2, as to an applicant's *bona fides*, 422 U.S. at 781-785.

Thus, the gratuitous suggestion by the Court of Appeals that the State could always verify the applicant's *bona fides* at a later date and recoup EA obtained through fraud (JS 19a), serves to underscore the extent to which the Second Circuit has failed to follow the decisions of this Court and has encroached upon the power of the Legislature.

C.

The lower courts also violated the principles set out in *Dandridge* v. *Williams, supra,* in another important respect, by encroaching on the prerogative of the Legislature to set the State's priorities and to shape its public welfare program according to its best judgment.

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. *Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69-70. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan* v. *Maryland,* 366 U.S. 420, 426." 397 U.S. at 485.

In the instant case, it cannot be denied that Congress clearly intended that the States should have maximum flexibility first in deciding whether to participate in the EA program and second, exactly what emergencies were to be covered, *Social Security Amendments of 1967,* Report of the Committee on Ways and Means, 90th Cong., 1st Sess., H. Rep. No. 544 (1967), p. 109. In *Quern* v. *Mandley, supra,* this Court observed that:

> "[u]nlike the basic AFDC program and the optional AFDC-UF extension, EA is not a comprehensive system of income maintenance, but rather a program de-

> signed to allow quick, ad hoc responses to immediate needs." 436 U.S. at 744.

In providing federal funds, Congress intended to encourage the States to render swift, appropriate assistance so as to encourage self-support and preclude, where possible, the need for permanent public assistance, *ibid.* Although this Court never reached the constitutionality of Illinois' legislative choices, merely holding that they did not violate the Federal supremacy of the Social Security Act, the recognition by this Court of the wide latitude that Congress intended to give the states, 436 U.S. at 743, *et seq.*, demonstrates the basic rationality under the Equal Protection Clause of the determination made by New York.

As pointed out in the Hickey affidavit (161a), it was New York's intent to adopt a program to deal with *emergencies,* not to supplement regularly recurring public assistance. Like New York, the other 27 states that have included EA in their welfare plans have addressed themselves to a variety of problems.* In *Jefferson* v. *Hackney, supra,* 406 U.S. at 546, this Court emphasized that:

> "so long as its judgments are rational and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket."

By failing to respect the diversity in Emergency Assistance programs authorized by Congress, the lower courts have placed New York in the type of "constitutional straitjacket" condemned by this Court in *Jefferson* v. *Hackney, supra.* Neither New York nor any of the other states should be required to suffer this restraint.

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* See addendum to brief, p. 24 *infra.*

Conclusion

The judgment appealed from should be reversed.

Dated: New York, New York
February 4, 1982

Respectfully submitted,

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Appendix

ADDENDUM

Summary of state Emergency Assistance programs, excerpted from "Characteristics of State Plans for Aid to Families With Dependent Children Under the Social Security Act, Title IV-A" (U.S. Dept. of Health and Human Services, 1981). Numbers in parentheses following state name refer to pages thereof.

State	*Conditions of Eligibility*	*Migrants Eligible*	*Emergencies Covered*	*Assistance Given*	*Type of Payment*
Arkansas (15)	A	No	b,c,d,f,g,k	s,p	W,Y
Connecticut (27)	A,E	No	g	d	Y
Delaware (31)	D	Yes	a	a,b,c,f,g,p	Y
Dist. of Col. (35)	A	Yes	a	a	W,Y
Illinois (60)	A,C,D	No	f,h,k,l	a,b,c,g,p,r	Y
Kansas (71)	A,C	Yes	b,c,f,g	b,c,d,f,g,j	W,Y
Kentucky (75)	A	Yes	a	a,b,c,f,g,p,r,s	W,Y
Maryland (88)	A	Yes	b,c,f,h,j,m	a,b,c,d,f,g,h,j	W,Y
Massachusetts (91)	A	Yes	b,c	a,b,c,d,e,f,g	W,Y
Michigan (95)	B,F	Yes	b,c,j,k,l	a,b,c,e,g,j	W,X,Y
Minnesota (99)	A	Yes	a,j	a,b,c,d,e,p,s	W,Y
Missouri (108)	A	No	a	a,b,c,d	Y

State	*Conditions of Eligibility*	*Migrants Eligible*	*Emergencies Covered*	*Assistance Given*	*Type of Payment*
Montana (111)	A	Yes	c,d	a,b,c,d,e,f,g, h,j,n,o	W,X,Y,Z
Nebraska (116)	A	Yes	a	a,b,c,d,e,f,n,o	W,Y
New Jersey (127)	E	Yes	a,b	a,b,c,f	W,Y
New York (136)	A	Yes	a,b,c,d	a,b,c,d,f,g,k,p	W,X,Y
Ohio (150)	A	Yes	a,b,h,n	a,b,c,d,e,j,m	W,Y
Oklahoma (153)	A,C	Yes	b,c,d,f,n,o	q	W
Oregon (157)	A	Yes	a,f,g	s	W,Y
Pennsylvania (161)	G	Yes	a,e	s,j	W,Y
Puerto Rico (165)	A	Yes	a,p	s,p	W,X
Vermont (194)	A	Yes	a,p	a,b,c,d,e,f,p,s	W,Y
Virgin Is. (197)	H	Yes	a,p	a,b,c,p,r	W,Y
Virginia (201)	A	No	b,c	a,b,c,k,s	W,Y
Washington (206)	B	Yes	a,b,c	a,b,c,e,r,s	W,Y
Wisconson (214)	A	Yes	b,c	a,b,c,e,k,r,s	not specified
Wyoming (217)	H	Yes	b,c,e,o	a,b,c,d,e,s may vary according to categorical eligibility	W,Y

Key to Abreviations

CONDITIONS OF ELIGIBILITY

A—tracks general federal requirements, 42 U.S.C. § 606 (e)(1), children up to age 21

B—tracks general federal requirements, 42 U.S.C. § 606 (e)(1), children up to age 18

C—residence requirement

D—limited to AFDC recipients or eligibles

E—AFDC and other public assistance recipients

F—AFDC, other public assistance recipients and non-public assistance recipients

H—General need

EMERGENCIES COVERED

a. unanticipated crisis rendering child or family destitute

b. natural disaster or civil disorder

c. fire, flood, etc.

d. accident, illness, death

e. divorce, desertion, imprisonment

f. eviction or foreclosure due to inability to pay

g. utility cut-off due to inability to pay

h. theft or other crime

j. homelessness of child or need for protective services

k. medical emergency or expense incidental to medical care

ASSISTANCE GIVEN

a. food

b. clothing

c. shelter

d. utility expenses

e. medical care and incidental expenses

f. furniture

g. replacement or repair of appliances

h. provide living arrangements

j. monetary limitations on some or all forms of assistance

k. home repairs

m. miscellaneous

n. homemaking services

o. legal services

p. counselling and referral to appropriate agencies

q. same as AFDC

r. transportation

s. appropriate goods and services designed to meet specific needs

METHOD OF PAYMENT

W. Cash or check

X. Goods and Services in Kind

Y. Vendor Payments

Z. Protective Payments

The following jurisdictions have elected not to participate in the Emergency Assistance program: Alabama (3), Alaska (former participant) (7), Arizona (11), California (19), Colorado (23), Florida (39), Georgia (43), Guam (47), Hawaii (51), Idaho (55), Indiana (63), Iowa (67), Louisiana (79), Maine (83), Mississippi (103), Nevada (119), New Hampshire (123), New Mexico (131), North Carolina (141), North Dakota (145), Rhode Island (former participant) (169), South Carolina (173), South Dakota (177), Tennessee (181), Texas (185), Utah (former participant (189).

Appellee's Brief

Supreme Court, U.S.
FILED
MAR 15 1982
ALEXANDER L. STEVAS
CLERK

No. 81-770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BARBARA BLUM, as successor in office to PHILIP L. TOIA, sued individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

-against-

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated FREDDIE MAE GOODWINE, LINDA SELDERS and GERTRUDE PARRISH,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF FOR APPELLEES

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QUESTION PRESENTED

Whether New York emergency assistance provisions that discriminate against AFDC and other public assistance families violate the federal Social Security Act and implementing HHS regulations, and the Equal Protection Clause.

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McGinnis v. *Royster*, 410 U.S. 263 (1973) 30

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Morgan v. *Maher*, 449 F.Supp. 229 (D.Conn. 1978), *aff'd*, 591 F.2d 1331 (2d Cir. 1978) 40

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Propper v. *Clark*, 337 U.S. 472 (1949) 34

Public Utilities Comm. v. *United States*, 355 U.S. 534 (1958) 24

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Amicus Curiae Brief of the United States in *Alexander* v. *Swank*, U.S. Sup.Ct. Nos. 70-5032, 5021 (Aug. 19, 1971) 16

Amicus Curiae Brief of the United States in *Ingerson* v. *Sharp*, 423 F.Supp. 139 (D. Mass. 1976) 21

W. Bell, *Aid to Dependent Children*, (Columbia University Press, 1965) 13, 15, 16, 18

Boskin and Nold, *A Markov Model of Turnover in Aid to Families with Dependent Children*, 10 Journal of Human Resources (1975) 43

Brief for the United States in *National Welfare Rights Organization* v. *United States Department of Health, Education and Welfare*, D.D.C. Civil Action No. 264-73 16

Comment, *Welfare's "Condition X"*, 76 Yale L.J. p. 1222 (1967) 15, 18, 19

Comment: *Eligibility Requirements Unrelated to Need: The Impact of King* v. *Smith*, 118 Univ.Penn.L.Rev. p. 1219 (1970) ..... *passim*

U.S. Congress, House Committee on Appropriations, Independent Offices Appropriations Bill of 1939 Hearings, 75th Cong., 2nd Sess. 17

113 Cong. Rec. (1967)

p. 23055 19

p. 36924 30

2 Davis, *Administrative Law Treatise*, § 7.10 (2d Edition 1979) 13, 24

Dixon and Storfer, *Trends in the Characteristics of AFDC Families in New York City*, 1969-1979 (November 1981) 43

H. Rep. No. 615, 7th Cong., 1st Sess. 24 (1935) 14

H. Rep. No. 544, 90th Cong., 1st Sess. (1967) 27, 42

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6 Moore, Federal Practice, ¶ 56.22[1] 31

S. Rep. No. 628, 74th Cong., 1st Sess., 36 (1935) 14

S. Rep. No. 744, 90th Cong., 1st Sess., U.S. Code Cong. & Admin. News (1967) 4, 27, 42

S. Rep. No. 1230, 92nd Cong., 2nd Sess. (1972) 28

Steiner, *Social Insecurity*, (Rand McNally, 1966) 19

Tribe, *American Constitutional Law*, (1978) 40

10 Wright and Miller, *Federal Practice & Procedure*, § 2738 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-770

BARBARA BLUM, as successor in office to PHILIP L. TOIA, sued individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

-against-

JEANNE BACON, individually and on behalf of her minor children, ROBERT BACON and IFE BACON, and on behalf of all other persons similarly situated FREDDIE MAE GOODWINE, LINDA SELDERS and GERTRUDE PARRISH,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF FOR APPELLEES

STATEMENT OF THE CASE

A. ***Statement of Facts.***

Plaintiff Jeanne Bacon resides with her son, Robert, age 5, and daughter, Ife, age 3. The family is solely dependent upon an AFDC grant of $200 per month, exclusive of rent.(39a).*

On June 1, 1977, plaintiff received her monthly AFDC check.(39a). On that date, she cashed her check, paid utility bills totalling $50, and paid $76 for $130 worth of food stamps.

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* The references to the Joint Appendix are referred to as "a." References to the Appendix of the Jurisdictional Statement are referred to as "J.S."

She put the food stamps and remaining cash ($74) in her wallet.(39a)

While shopping, Ms. Bacon noticed that her wallet and food stamps, which she had placed in her jacket pocket, were missing.(39a). She promptly reported the theft to the police department and to the Department of Social Services ("DSS").(39a) Ms. Bacon explained to an employee of DSS that she had no money to purchase food and other essential items for herself and her two minor children and requested emergency assistance ("EAF").(39-40a).

On June 3, 1977, plaintiff was informed by a Supervisor of DSS that her request had been denied on the basis of a "new law" that automatically precludes the furnishing of emergency assistance to replace lost or stolen public assistance.(40a). This denial was confirmed in a letter from DSS.(25a).

This left the family without funds to meet its basic living needs. There was no money to purchase food, take the children to the doctor and dentist, or wash the family clothes.(42a). Plaintiff herself suffers from a medical problem requiring weekly doctor's visits, but the theft left her without bus fare to get to his office.(42a).

Pursuant to a temporary restraining order issued by the district court, DSS reconsidered Jeanne Bacon's application for EAF free of the automatic disqualifications, and, after interviewing her, found her to be eligible and replaced the stolen cash and food stamps. (114a,119a).

Plaintiff Gertrude Parrish is also an AFDC mother whose family was rendered destitute by a theft.(99a). Her apartment was broken into and ransacked, and the family's food and AFDC funds stolen.(97a). Her application for assistance was also automatically denied by DSS pursuant to the contested provisions.(98a).

The other plaintiffs in this case are also indigent mothers with minor children whose families depend entirely upon their

AFDC grants. Some of their AFDC funds were either lost or stolen, leaving their families impoverished. When they sought assistance from DSS, they were informed that their applications were denied pursuant to New York statutes that absolutely barred them from receiving EAF.(45-47,49-52,54,96-99a).

The denials occurred pursuant to provisions of the New York Social Services Law that (1) single out families eligible for AFDC for the automatic denial of cash EAF, regardless of the circumstances, and (2) single out public assistance (including AFDC) families for the automatic denial of EAF in all cases of loss or theft of public assistance. (Brief for Appellants, pp.6-7). The district court certified subclasses that correspond to each of these restrictions.(136-144a).

B. ***Statutory Scheme.***

The "emergency assistance to needy families with children" program is a categorical program that provides "money payments," "payments in kind" and "services" when "necessary to avoid [the] destitution" of needy children. 42 U.S.C. § 606(e). Assistance must be provided to eligible families "forthwith." 45 C.F.R. § 233.120(a)(5). It may be granted only for a maximum of 30 days in any 12 month period. 42 U.S.C. § 606(e). The Secretary of the United States Department of Health and Human Services ("HHS") is charged with responsibility for approving state EAF plans and reimbursing participating states in "an amount equal to 50 per centum of the total amount expended under the State plan . . . as emergency assistance to needy families with children."42 U.S.C. § 603(a)(5).

1. ***The Cash-Services Provisions.***

Families in New York who are rendered destitute are generally eligible for EAF "aid, care and services," including cash, payments in kind and vendor payments. *N.Y. Social Services Law*, § 350-j(2); 42 U.S.C. § 606(e). But New York singles out families who are eligible for AFDC assistance, and

absolutely bars them from receiving cash EAF regardless of the circumstances. The New York Social Services Law states that it is an eligibility requirement for EAF that:

> "in cases of applications for grants of cash assistance, such child or such household is not categorically eligible for or receiving aid to dependent children. . . . " *N.Y. Social Services Law*, § 350-j(2)(c).

This restriction is repeated in the statute:

> "Such emergency assistance, but not including cash grants, may be furnished to a family eligible for aid to dependent children only in the form of emergency services. . . . " *N.Y. Social Services Law*, § 350-j(3).

Families who are eligible for any other type of public benefit such as home relief, social security, Supplemental Security Income ("SSI") and unemployment insurance, as well as families who do not receive any public benefits, are eligible for EAF cash and services.[1] Intact home relief families, who receive recurring grants of cash assistance at the same level of benefits as AFDC families and who are equally eligible for certain special grants, *N.Y. Social Services Law*, §§ 131-a, 158-159, also may receive EAF cash and services.[2] But needy families with children who are eligible for AFDC because there is an absent or disabled parent, 42 U.S.C. § 606(a), may only receive EAF "services."

Limiting AFDC families to emergency "services" not only disqualifies them from receiving cash EAF, but also from receiving payments in kind and voucher payments. The federal statute draws a distinction between "(A) money payments,

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[1] A family does not have to be eligible for public assistance in order to be eligible for emergency assistance. *Quern* v. *Mandley*, 436 U.S. 725, 729 (1978); 42 U.S.C. § 606(e); S. Rep. No. 744, 90th Cong. 1st Sess., 2 U.S. Code Cong. & Admin. News, p. 3003.

[2] These families are not eligible for AFDC because an "absent" parent is a requisite of AFDC eligibility. 42 U.S.C. § 606(a).

payments in kind, or other payments," and "(B) such services as may be specified by the Secretary." 42 U.S.C. § 606(e). The implementing federal regulation distinguishes between three types of expenditures for which federal financial participation is available: (1) "money payments, payments in kind, or such other payments as the State agency specifies, including loans and vendor payments. . . . "; (2) administrative expenses; and (3) "services." 45 C.F.R. § 233.120(b)(2). The implementing federal regulation specifies the reimbursable services as "[i]nformation, referral, counseling, securing family shelter, child care, legal services, and other services that meet needs attributable to the emergency or unusual crisis situations." *Id. Accord,* 45 C.F.R. § 233.120(a)(4). New York essentially adopts the federal definition of "services." 18 N.Y.C.R.R. § 372.4(d). AFDC families are limited to these EAF services.

New York does authorize special grants for all public assistance recipients for the loss of furniture and clothing in cases of "fire, flood or other like catastrophe." *N.Y. Social Services Law,* § 131-a(6)(a). But unlike EAF, special grants need not be provided "forthwith." Moreover, New York's highest court has construed "catastrophe" as "encompass[ing] only a natural occurrence" and has ruled that this special grant is not coterminous with EAF. *Howard* v. *Wyman,* 28 N.Y.2d 434,437, 322 N.Y.S.2d 683,685 (1971). This special grant thus excludes non "catastrophe" emergency events, such as burglaries, *Howard* v. *Wyman, supra,* as well as necessities other than furniture and clothing, such as food and shelter. These events and needs are within the scope of section 350-j.

2. *The Lost-Theft Provision.*

Families in New York who are rendered destitute by the loss or theft of cash are generally eligible for EAF. A wide array of families who claim the loss or theft of a variety of public benefits, such as social security, SSI, unemployment insurance, workers' compensation, and railroad retirement bene-

fits, as well as non-public funds such as support payments, wages and pensions, may apply for EAF and their applications are given individual consideration. (J.S. 18a; 148a).

New York, however, automatically denies EAF in all cases of loss or theft of public assistance. Section 350-j(2)(e) of the Social Services Law makes it an eligibility requirement for EAF that "in the case of a person receiving public assistance [destitution] did not result from the loss [or] theft . . . of a regular public assistance grant. . . . "[3] The New York Social Services Law defines "public assistance" as including "home relief, veteran assistance, aid to dependent children, medical assistance for needy persons, institutional care to adults, and child care granted at public expense.. . . . " *N.Y. Social Services Law*, § 2(20).[4]

An AFDC family that has been the victim of a loss or theft of its public assistance grant is thus automatically disqualified from receiving EAF. Neither the *bona fides* of the claimed loss or theft nor the needs of the family are considered.(153a). On the other hand, when non-recipients of public assistance claim that a loss or theft of cash has rendered them destitute, their applications for EAF are given individual consideration.

3. *The Duplication Provision.*

There is a third restriction on EAF that was initially challenged by plaintiffs. Subsection 2(f) of section 350-j of the New

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[3] This section also refers to the denial of emergency assistance in cases of "mismanagement" of the public assistance grant. The validity of denying EAF in mismanagement cases is not at issue here. (148a).

[4] Prior to 1974, New York's definition of "public assistance" included "old age assistance, assistance to the blind [and] aid to the disabled. . . ." These categories of assistance were removed from the definition of public assistance when they were replaced by the SSI program in 1974. 1974 *Laws of New York*, Ch. 1080. SSI recipients are not within New York's definition of "public assistance." They are eligible for EAF, *inter alia*, to replace lost or stolen SSI funds. *N.Y. Social Services Law*, § 302(b).

York Social Services Law precludes the granting of EAF when requested to "replace or duplicate a public assistance grant already made. . . . "

In its decision of June 23, 1980, the district court found that this provision was valid because it served to limit EAF "to specific unforeseeable crisis situations and to prevent recipients of public assistance from resorting to section 350-j as a source of supplemental income to augment a public assistance grant. . . . " (J.S. 44a). But the district court also found that "if a welfare family's circumstances change due to an emergency," this provision does not prevent a family from receiving EAF. *Id.* The State Commissioner does not take the position that welfare recipients are never eligible for EAF. On the contrary, she acknowledges that EAF is provided to public assistance recipients.(163a)

The district court's reading of the duplication provision is consistent with the well recognized distinction in New York law between "the terms 'emergency' and 'duplicate' assistance. . . . " *Matter of Jones* v. *Berman*, 37 N.Y.2d 42,54, 371 N.Y.S.2d 422 (1975). *Compare, N.Y. Social Services Law*, § 350-j with *N.Y. Social Services Law*, § 131(11). Further, it is consistent with the requirement in New York that EAF applies only to "sudden and unexplained emergency events," *Baumes* v. *Lavine*, 38 N.Y.2d 296,305, 379 N.Y.S.2d 760,766 (1975), and is not available to simply "augment a public assistance grant." (J.S.44a). In view of the district court's conclusion that the duplication provision does not preclude the granting of EAF to public assistance families in crisis situations, plaintiffs abandoned their attack on this provision.

SUMMARY OF ARGUMENT

The contested State provisions violate the Social Security Act and implementing regulations. Pursuant to his rulemaking power, the Secretary of HHS promulgated a regulation prohibiting state discrimination in categorical programs that is

inconsistent with the "purposes of the public assistance titles of the Social Security Act." 45 C.F.R. § 233.10(a)(1). The Secretary has interpreted this equitable treatment regulation as prohibiting EAF discrimination against AFDC families, and has concluded that the contested New York provisions violate this regulation. The Secretary's position is valid because it is reasonably related to the purposes of the federal EAF statute. Moreover, the Secretary's position is fully consistent with this Court's holding in *Quern* v. *Mandley*, 436 U.S. 725 (1978) because while the states have broad discretion in shaping their EAF programs, they remain subject to the Secretary's power to prohibit EAF plans that frustrate the purposes of the federal Act.

The Court below correctly held that New York's EAF discrimination against AFDC and other public assistance families is irrational and violative of the Equal Protection Clause. The State seeks to support the cash-services provision by arguing that while AFDC families are automatically denied cash EAF, they remain eligible for special grants under the AFDC program. But a special grants program is separate and distinct from an EAF program. The State's argument has been rejected by the Secretary of HHS, by the district court, and by the court of appeals, which held that the two programs are not coterminous. Since the constitutional question involved is dependent upon an analysis of state law, this Court should accept the state law analysis in which the district court and circuit court concurred, and which is supported by the decision of New York's highest court in *Howard* v. *Wyman*, 28 N.Y.2d 434 (1971). *See Bishop* v. *Wood*, 426 U.S. 341,346 (1976).

The only argument advanced by the State to support the loss-theft provision is the state's interest in preventing fraudulent claims. But the state's legitimate interest in preventing spurious claims does not provide a rationale for discriminating against public assistance families, since these families are no more likely to submit a fraudulent claim of loss or theft than are

other families who claim that a loss or theft has rendered them destitute. Where, as here, the two classes have an equal potential for fraud, the State violates the Equal Protection Clause by treating them differently. *Jimenez* v. *Weinberger*, 417 U.S. 628,635-636 (1974); *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973); *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973).

ARGUMENT

I.

The Contested State Provisions Violate The Federal Social Security Act and Implementing Regulations As Interpreted By The Secretary Of HHS.

The court below ruled that the contested New York provisions create irrational classifications in violation of the Equal Protection Clause. In addition to the constitutional claim, plaintiffs have also alleged that the contested provisions violate the federal Social Security Act and implementing regulations. This claim is asserted in the complaint (18a), and has been decided by both the district court (144-154a,175-178a), and the court of appeals. (J.S. 9-13a). "A court presented with both statutory and constitutional grounds to support the relief requested usually should pass on the statutory claim before considering the constitutional question." *Califano* v. *Yamasaki*, 442 U.S. 682,692 (1979); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568,582 (1979).

The State Commissioner's contention that the federal statutory claim is not before the Court because plaintiffs have not cross-appealed is without merit. It is well "settled that the appellee may, without taking a cross-appeal, urge in support of a decree, any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court. . . . " *United States* v. *American Railway Express Co.*, 265 U.S. 425,435-436 (1974). This " 'inveterate and certain' " rule is applicable to plaintiffs' statutory claim. *Massachusetts*

Mutual Life Ins. Co. v. *Ludwig*, 426 U.S. 479,480-481 (1976). *See, United States* v. *New York Telephone Co.*, 434 U.S. 159,166 n.8 (1977); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406,419 (1977); *Hankerson* v. *North Carolina*, 432 U.S. 233,240 n.6 (1977); *Dandridge* v. *Williams*, 397 U.S. 471,475 n.6 (1970); *Langnes* v. *Green*, 282 U.S. 531,535-539 (1931).

This Court has observed that "[a]ttacks on state welfare statutes often combine Equal Protection Clause and Supremacy Clause issues." *Youakim* v. *Miller*, 425 U.S. 231,234 (1976). In these cases, this Court has resolved the statutory claim first where plaintiff prevailed on it in the court below, *California Department of Human Resources* v. *Java*, 402 U.S. 121,124 (1971); *King* v. *Smith*, 392 U.S. 309 (1968), where it was rejected by the court below, *Harris* v. *McCree*, 100 S.Ct. 2671,2682-83 (1980), and even where it was raised but not decided by the court below. *United States* v. *Clark*, 445 U.S. 23 (1980); *Califano* v. *Yamasaki*, *supra* at 692-693; *New York City Transit Authority* v. *Beazer*, *supra* at 583 n.24; *University of California Regents* v. *Bakke*, 438 U.S. 265,281 (1978); *Dandridge* v. *Williams*, *supra* at 475-476. Cf. *Youakim* v. *Miller*, *supra* at 235 (plaintiff permitted to amend complaint to assert statutory claim). In none of these cases, nor in any others where constitutional and statutory claims are raised, has this Court required plaintiff to cross-appeal in order to raise the statutory claim.

The controlling consideration is "this Court's policy of avoiding the unnecessary adjudication of federal constitutional questions." *City of Mesquite* v. *Alladin's Castle*, 50 USLW 4210,4214 (U.S. Feb. 23, 1982). This policy is "more deeply rooted than any other in the process of constitutional adjudication.. . . " *Spector Motor* v. *McLaughlin*, 323 U.S. 101,105 (1944). Acceptance of the State Commissioner's argument would force a constitutional ruling in violation of these principles. The statutory question is thus properly before the Court.

Plaintiffs contend that the contested provisions are invalid under the Social Security Act and implementing regulations because they discriminate against AFDC families. The record shows that plaintiffs' position is fully supported by the Secretary of the United States Department of Health and Human Services. In an Action Transmittal issued shortly after this Court's decision in *Quern* v. *Mandley*, 436 U.S. 725 (1978), the Secretary, while recognizing the holding in *Quern*, required that State EAF plans include AFDC families, and made coverage of other families optional. (172-174a).

Moreover, pursuant to the procedure set forth in *Rosado* v. *Wyman*, 397 U.S. 397,406-407 (1970), the court below requested the Secretary to submit an *amicus curiae* brief setting forth the position of HHS. After fully analyzing the federal statutory-regulatory issue, the Secretary concluded that the challenged New York provisions are invalid because EAF discrimination against AFDC families violates implementing federal regulation 45 C.F.R. § 233.10(a)(1). (Brief of the Secretary of HHS as Amicus Curiae in the court below, reproduced in Appendix to Appellees' Motion to Affirm.) This regulation applies to State plans under Title IV-a and provides that:

> "The groups selected for inclusion in the [Title IV-a] plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." 45 C.F.R. § 233.10(a)(1).

The Secretary reasoned that (1) this "equitable treatment" regulation was promulgated pursuant to his broad rulemaking power and thus is entitled to "legislative effect," (2) the equitable treatment regulation applies to the EAF program because it applies without limitation to the entire Title IV-a plan, (3) *Quern* v. *Mandley*, 436 U.S. 725 (1978) did not involve the equitable treatment policy because the Illinois statute in that

case reasonably limited EAF to those eligible for AFDC,(4) EAF discrimination against AFDC recipients violates the equitable treatment principle embodied in section 233.10(a)(1), and that (5) New York's cash-services and loss-theft provisions discriminate against AFDC families in violation of the equitable treatment regulation.

The Secretary stated that his determination is harmonious with the position he took in *Quern* v. *Mandley*, *supra*, and the holding in that case, because *Quern* "should not be read to mean that States are not subject to any Federal requirements or conditions in their administration of their EA programs.. . . " (Brief of the Secretary, p.5a). "The kind of inequitable treatment in this case, which is discrimination against AFDC recipients, is particularly inconsistent with the purposes of the EA program.. . . " *Id.* at p.5a. The Secretary thus determined that New York's EAF program may not discriminate against its most vulnerable needy citizens, indigent mothers with dependent minor children.

In *Quern*, this Court agreed with the Secretary's position that section 406(e) does not require the tates to cover all emergencies within the scope of that statute, or any specific emergencies. In accepting the Secretary's position, this Court stated that it is entitled to "considerable deference." *Quern* v. *Mandley*, *supra* at 743, n.19. This is consistent with a long line of cases under the Social Security Act in which this Court has determined that the Secretary's views should be followed "unless there are compelling indications that it is wrong.. . . " *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405,421 (1973). *See*, *Miller* v. *Youakim*, 440 U.S. 125,144 (1979); *Beal* v. *Doe*, 432 U.S. 438,447 (1977); *Youakim* v. *Miller*, 425 U.S. 231,235 (1976); *Rosado* v. *Wyman*, 397 U.S. 397,406 (1970); *Lewis* v. *Martin*, 397 U.S. 552 (1970).

In this case, the Secretary's position consists of his interpretation of a regulation promulgated pursuant to his rulemaking power in accordance with the notice and comment

procedure of the Administrative Procedure Act, and which was intended by the Secretary to have legislative effect. *See generally*, 2 Davis, *Administrative Law Treatise*, § 7:8 (1979). In these circumstances, the regulatory construction must be upheld so long as "it is reasonably related to the purposes of the enabling legislation under which it was promulgated." *Thorpe* v. *Housing Authority*, 393 U.S. 268,280-281 (1969). *Accord*, *Chrysler Corporation* v. *Brown*, 441 U.S. 281, 308 (1979); *Mourning* v. *Family Publications Service*, 411 U.S. 356,370 (1973).

Plaintiffs will demonstrate that the Secretary's position should be upheld because (1) the Secretary has broad rulemaking power; (2) since the enactment of the Social Security Act, the Secretary has consistently maintained regulatory power to prohibit state discrimination that conflicts with the purposes of a categorical assistance program; (3) the Secretary's application of his equitable treatment regulation to EAF is the product of a carefully and consistently developed policy; and (4) the Secretary's interpretation of the equitable treatment regulation prohibiting EAF discrimination against AFDC families is reasonable in light of the language, structure, purpose and legislative history of the federal EAF statute.

A. *Since The Enactment Of The Social Security Act, The Secretary And His Predecessors Have Had Extensive Rulemaking Power.*

The Social Security Act of 1935 established three categorical need programs, aid to the aged, the blind, and children. It was "the intention of Congress to leave the control over the nature and size of the AFDC program essentially to the states." W. Bell, *Aid to Dependent Children*, p.21 (1965). The 1935 Act "was interpreted by the committee reports of both Houses of Congress as permitting a state to 'impose such other eligibility requirements — as to means, moral character, etc. — as it sees fit.' " Comment: *Eligibility Requirements Unrelated to Need*, 118 Univ.Penn.L.Rev. 1219,1220 (1970), quoting from

H.Rep. No. 615, 74th Cong., 1st Sess. 24 (1935); S.Rep. No. 628, 74th Cong., 1st Sess. 36 (1935). It was not until 1951 that Congress considerably narrowed the areas of appropriate state discretion when it amended Title IV-a so as to require "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals,... . . " 42 U.S.C. § 602(a)(10). *See, Quern* v. *Mandley, supra* at 740.

But even when the states were granted broad discretion to establish eligibility conditions, Congress did not intend that their discretion would be unlimited and beyond the control of the federal agency charged with enforcing the federal Act. Since 1935, Congress has vested in the Secretary broad rule-making power "to make . . . such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the Social Security Act." 42 U.S.C. § 1302. This Court has described Section 1102 as vesting "broad rule-making powers . . . " in the Secretary. *Thorpe* v. *Housing Authority of Durham, supra* at 277 n.28. *Accord, Almenares* v. *Wyman,* 453 F.2d 1075,1087 (2d Cir. 1971)(Friendly, J.), *cert. denied,* 405 U.S. 944 (1972). *See also, Knebel* v. *Hein,* 429 U.S. 288,292-293 (1977). The Secretary's general rulemaking power under section 1102 is supplemented by 42 U.S.C. § 602(a)(5), which requires that state plans "provide such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan." *Arizona State Department* v. *HEW,* 449 F.2d 456,473 (9th Cir. 1972), *cert. denied,* 405 U.S. 919 (1972).[5]

Section 1102 constitutes a Congressional recognition that a grant of broad rulemaking power to the Secretary is not incompatible with a grant of broad discretion to the states. In categorical programs such as AFDC and EAF where the Secre-

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[5] In *Quern* v. *Mandley, supra* at 741-742, the Court stated that section 402(a)(5) applies to the entire Title IV-a plan, and thus to EAF.

tary is mandated to reimburse the states for a substantial percentage of their expenditures, 42 U.S.C. § 603, the Secretary must have the power to insure that the states exercise their discretion in a manner consistent with the purposes of the federal Act. Congress did not intend the Secretary to channel federal funds "to state programs at loggerheads" with federal policy. Note, *Welfare's "Condition X,"* 76 Yale L.J. 1222,1224 (1967).

This Court has recognized that "[t]he Social Security Act is among the most intricate ever drafted by Congress" and "[i]ts byzantine construction . . . makes the Act 'almost unintelligible to the uninitiated.' " *Schweiker* v. *Gray Panthers,* 101 S.Ct. 2633,2640 (1981). By vesting broad rulemaking authority in the Secretary under section 1102, Congress has wisely chosen to take advantage of the Secretary's expertise and vest in him the primary responsibility for interpreting and applying Title IV-a. *See generally, Federal Election Committee* v. *Democratic Campaign Committee,* 102 S.Ct. 38,45 (1981); *Ford Motor Credit Co.* v. *Milhollin,* 101 S.Ct. 790,794 (1980). This "helps guarantee that the rules will be written by 'masters of the subject.' " *National Muffler Dealers Ass'n.* v. *United States,* 440 U.S. 472,477 (1979).

B. *Throughout The History Of The Social Security Act, The Secretary Has Exercised His Rulemaking Power To Prohibit Inequitable Treatment By The States In Categorical Programs.*

Pursuant to section 1102, the Secretary has promulgated a regulation that prohibits State provisions that "result in equitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." 45 C.F.R. § 233.10(a)(1).

The Secretary and his predecessors have had an equitable treatment policy since the enactment of the Act. During the 1930's, the "[s]tates were informed of the federal expectation that programs would be administered equitably on behalf of needy children." W. Bell, *Aid to Dependent Children, supra* at

33. The suggestion of the 1935 Committee Reports that a state might "impose such other eligibility requirements . . . as it sees fit [was] never interpreted literally by . . . [HEW] or its predecessor agencies." 118 Univ.Penn.L.Rev., *supra* at 1221; Bell, *supra* at 189.

That the federal agency has consistently maintained this equitable treatment policy is demonstrated by *amicus curiae* briefs submitted by the Secretary to this and other federal courts, the federal agency's policy statements and regulations, and specific applications of the policy.

In a 1971 *amicus curiae* brief, the United States represented to this Court that:

> "The Department *has always* taken the position that in considering State AFDC plans, the Secretary has 'the inherent authority to reject a state plan which bears no rational relation to any purpose of the federal act.. . .'
>
> * * * *
>
> The Secretary has rejected plans which include eligibility limitations that were unreasonable based on such factors as race, illegitimacy, and the unsuitability of the dependent child's home — factors that were not reasonably related to the purposes of the Social Security Act. 42 U.S.C. § 601. The basis for these actions has been the Department's view that the several provisions of the public assistance titles of the Social Security Act, in combination, require that a state plan provide equitable treatment of individuals assisted under it. By the same token, *the Secretary would not approve classifications if he believed that the Act intended the class denied benefits to have a higher priority than the class made eligible under state law.*" *Brief for the United States in Alexander* v. *Swank*, U.S. Sup.Ct. Nos. 70-5032,5021, Aug. 19, 1971) (emphasis added).[6]

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[6] HEW took the same position in *Arizona State Department of Public Welfare* v. *HEW*, *supra* at 475 n.27, and in its Memorandum of Points and Authorities in *National Welfare Rights Organization* v. *United States Department of Health, Education and Welfare*, D.D.C. Civil Action No., 264-73 at p. 13.

Evidence of the policy dates back to 1939. During the 1939 Appropriations Hearings, the Chairman of the Social Security Board, Dr. Arthur Altmeyer, testified that while the states had broad discretion in establishing eligibility requirements for aid to the elderly, "we do require that there shall be no discrimination between individuals." U.S. Congress, House Committee on Appropriations, Independent Offices Appropriations Bill for 1939 Hearings, 75th Cong., 2d Sess., pp.1124-25. And, a 1939 memorandum on behalf of the Office of General Counsel of the federal agency states that while "the States do not have to include any particular group or anybody in their plans . . . [w]e insist . . . that they must keep within basic legal principles of classification . . . They must not classify by the color of the hair, or for that matter, upon any basis of grouping that is not germane in some degree to the problem at hand. . . . " Memorandum from A. D. Smith to Geoffrey May, Dec. 20, 1939, p.4, quoted in part in 118 Univ. of Penn.L.Rev., *supra* at 1222.

The same policy appeared in the Handbook of Public Assistance.[7] One Handbook provision stated that "primary responsibility rests with the State agencies to determine the purposes and scope of their assistance programs *within the framework set forth in the Federal Act.*" *Handbook of Public Assistance*, Part IV, § 4210 (Nov. 30, 1962)(emphasis added). A second provision stated that "States may provide coverage on broader or more limited bases . . . *so long as conditions of eligibility are consistent with the purposes of the particular title.*" *Handbook of Public Assistance*, Part I, § 5000 (Dec. 8, 1966)(emphasis added).

The current formulation of the equitable treatment policy, 45 C.F.R. § 233.10(a)(1), was published as a Notice of Proposed

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[7] Prior to 1968, the Handbook was "the official medium for the issuance of interpretations and instructions concerning requirements of the public assistance Titles of the Social Security Act." Handbook of Public Assistance, Introduction, p. 1 (1962). In 1968, the Handbook was revised for purposes of publication in the Federal Register.

Rulemaking in the Federal Register on June 5, 1970, 35 Fed. Reg. 8786, and, after comments were invited and reviewed, was published in final form at 36 Fed.Reg. 3866. It continues the Secretary's longstanding policy of prohibiting state discrimination that conflicts with the purposes of a categorical assistance program.

The federal agency has enforced this policy throughout the history of the Social Security Act, in some instances with the specific knowledge and acquiescence of Congress. During the 1930's, the Social Security Board refused to approve one State AFDC plan that established a racial quota in its welfare program, and another which attempted to exclude Indians living on reservations. 76 Yale L.J. *supra* at 1222-3, n.7; 118 Univ.Penn.L.Rev., *supra* at 1223. In the case of the racial quota, "the Social Security Board temporarily withheld quarterly matching funds.. . . " Bell, *supra* at 35. Congress was specifically informed by the President of the Indian question and did not disturb the administrative interpretation. *See*, Comment, 118 Univ.Penn.L.Rev., *supra* at 1223, n.41.

In the 1940's the Board recommended that the states repeal "suitable home" eligibility conditions. Bell, *supra* at 51. In the 1950's, the federal agency announced that state AFDC plans denying aid to illegitimate children would be disapproved. Comment, 118 Univ.Penn.L.Rev. *supra* at 1223-4; Comment, 76 Yale L.J. *supra* at 1222-3 n.7. This culminated in 1961 with the Fleming Ruling prohibiting the denial of AFDC on the basis of unsuitable home conditions. *King* v. *Smith*, *supra* at 322-323. HEW's rationale was that this eligibility requirement was "an unreasonable and arbitrary classification of needy children and a denial of benefits to this class contrary to the Social Security Act." Bell, *supra* at 142. The Fleming ruling was subsequently approved by Congress and enacted into law. *King* v. *Smith*, *supra* at 322-323.

In 1963, HEW applied its equitable treatment policy when it disapproved a state's definition of unemployment for AFDC-U purposes. Steiner, *Social Insecurity*, pp.101-107 (Rand McNally 1966); 118 Univ. of Penn.L.Rev. *supra* at 1225; 76 Yale. L.J. *supra* at 1222-3 n.7. An HEW official found that the state rule created an "unreasonable classification. . . . " Steiner, *supra* at 103.

During the 1967 debates on the amendments to the Social Security Act, the session that produced section 406(e), Wilbur Mills, the Chairman of the Ways and Means Committee, recognized that the States are subject to "a requirement in the law that requires equal treatment of recipients. . . . " 113 Cong.Rec. 23055 (Aug. 17, 1967). *See, Arizona State Dept.* v. *HEW*, *supra* at 475 n.27.

The Secretary has thus applied an equitable treatment policy in categorical programs for over forty years. The policy existed from 1935-1950 with respect to categorical programs that resembled the present EAF program in the sense of vesting the states with broad discretion to establish eligibility requirements. Congress has known of the policy, has approved applications of it, and has maintained the Secretary's broad rulemaking power. *See generally, Lorillard* v. *Pons*, 434 U.S. 575,580 (1978); *Saxbe* v. *Bustos*, 419 U.S. 65,74 (1974); *NLRB* v. *Bell Aerospace*, 416 U.S. 267,274-75 (1974); *Zemel* v. *Rusk*, 381 U.S. 1,11 (1965). This analysis demonstrates that the Secretary's equitable treatment regulation is within the scope of his broad rulemaking power.

C. *The Secretary Has Carefully And Consistently Developed A Policy Of Prohibiting EAF Discrimination Against AFDC Recipients.*

The first indication of the Secretary's position regarding the treatment of AFDC recipients in the EAF program appears in *Baxter* v. *Minter*, 378 F.Supp. 1213 (D.Mass. 1974). In that case, the State represented to the court that "HEW recom-

mended that Massachusetts utilize AFDC and GR [i.e., General Relief] eligibility standards in implementing its EA program." *Id.* at 1220.

Shortly after New York's enactment of the 1977 amendments to section 350-j, a Regional Commissioner of HEW informed the deputy Commissioner for Income Maintenance of New York DSS that "there may be legal problems in eliminating the availability of emergency cash assistance to AFDC families" and with the "preclusion of EAF in the event of lost [or] stolen funds. . . . " (75a)[8]

The Secretary of HEW was a party defendant in *Quern* v. *Mandley, supra,* and in that capacity submitted a brief to this Court. In Point II of that Brief, the Secretary took the position that participating states are not required to cover all emergencies within the scope of 42 U.S.C. § 606(e). But since the Illinois plan at issue in *Quern* did not discriminate against AFDC recipients, the Secretary did not discuss the applicability of 45 C.F.R. § 233.10(a)(1) to EAF.

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[8] The State Commissioner contends that in 1973, HEW approved a State *regulation* that prohibited the provision of EAF in cases of loss or theft of public assistance. The document referred to by the State Commissioner does not indicate that this specific regulation was approved. (164-166a). The HEW document refers to amendments to the State plan that were effective "November 1972." (164a). But the loss-theft regulatory policy had been in effect since 1969. *Matter of Jones* v. *Berman,* 37 N.Y.2d 42, 52, 371 N.Y.S.2d 422, 428 (1975). Other State regulations not dealing with EAF do refer to November 1972 and it is presumably these that were the subject of the HEW approval. *See e.g.,* Historical Notes to 18 N.Y.C.R.R. §§ 385.2, 385.4, 385.6 and 385.7. And if, as appellant alleges, the state regulation was actually approved in 1972, there would have been no need for the Deputy Commissioner's 1974 request to an HEW Assistant Regional Attorney for advice regarding "stolen cash." (168-169a). Moreover, the alleged approval occurred 4 years prior to the 1977 amendments to the New York Social Services Law that are the subject of this case. The cash-services restriction did not exist in 1973, and the purported 1973 approval is thus irrelevant to this provision.

Within six months after the June 16, 1978 decision in *Quern* v. *Mandley, supra*, HEW issued Action Transmittal SSA-AT-78-44. (172-174a). Its timing is significant. The transmittal reiterates the holding in *Quern* that the "States remain free, under Federal policy, to develop their own definition of the kind of emergencies they will meet.. . . " (173a). But it also states that the legislative history of section 406(e) "makes it clear that the intent of the Emergency Assistance program is to deal with crisis situations threatening an AFDC or other needy family." (173-174a). Most importantly, the Transmittal states that: "*A State Plan must clearly specify that AFDC recipients are included in its EA program. Other categories of needy families with children may be included at State option,.. . . .* " (174a)(emphasis added). The Secretary thus takes the position that AFDC recipients be given preferred, not inferior, treatment in the EAF program, clearly inferring that the states are prohibited from discriminating against them.

On November 14, 1979, the United States submitted an *amicus curiae* brief at the request of the district court in *Ingerson* v. *Sharp*, 423 F.Supp. 139 (D.Mass. 1976).[9] The main issue in *Ingerson* was whether Massachusetts may deny EAF solely because of an individual's status as a recipient of public assistance.

The Secretary found that "45 C.F.R. § 233.10(a)(1) applies to a State's coverage and eligibility conditions in its emergency assistance program.. . . " (Amicus Curiae Brief, p.3). Section 233.10 is entitled "'General provisions regarding coverage and eligibility' which applies to all HEW financial assistance programs, presumably EA," and "[f]urthermore, § 233.10(a) sets out requirements for state plans under various titles of the Social Security Act, one of which is Title IV-A." (Amicus Curiae

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[9] A copy of this brief and other HEW documentation regarding *Ingerson* referred to *infra* have been lodged with the Clerk of the Court. This documentation was filed with the court of appeals.

Brief, pp.3-4). The Secretary stated that "nothing in *Quern* . . . undercuts the position that section 233.10 applies to the EA program" because:

> "In that case, the Supreme Court expressly considered the latitude of a state in specifying who is covered under the state's EA program; however, the court did not deal with the applicability of § 233.10 to EA. The reason for this was that such consideration was unnecessary in light of the specific issues involved. Under the state plan provision challenged in *Mandley*, only AFDC recipients were eligible for emergency assistance.. . . Regarding the issue of providing EA only to AFDC recipients, it is inherently reasonable that such individuals receive EA and therefore it was not necessary to reach § 233.10." (Amicus Curiae Brief, p.5).

A conclusion that section 233.10 does not apply to EAF would require the Secretary to fund state EAF programs no matter how whimsical, arbitrary or out of harmony they are with the purposes of the federal statute. The Secretary in *Ingerson* found that HEW would be left

> "in an untenable position were it to be faced with unreasonable state EA classifications for it would be almost powerless under its regulations to disapprove any classification, no matter how arbitrary. It was just such a concern that prompted HEW to develop early on a policy of 'equitable treatment' under the various public assistance programs it administered, with such policy being used to reject unreasonable classifications. Section 233.10 was later written to codify this policy and . . . this regulation applies as much to the EA program as it does to the various other HEW financial assistance programs." (*Id.* at p.6).

Subsequent to the submission of the *amicus curiae* brief in *Ingerson*, the Office of Family Assistance of HEW stated that it "is now prepared to say, as a matter of policy that a 'recipient status' rule is not acceptable." In its most recent opinion in *Ingerson*, the district court invalidated the Massachusetts recipient status rule, stating that "the Department of Health and

Human Services had determined that the recipient status rule violated the equitable treatment regulation." *Ingerson* v. *Pratt*, No. 76-3255-S (D. Mass. Feb. 8, 1982).

The Secretary's brief in this case (1) reaffirms the Secretary's position in *Ingerson* that section 233.10 applies to the EAF program, (2) construes section 233.10 as prohibiting state EAF provisions that discriminate against AFDC recipients, and (3) concludes that both the cash-services and loss-theft restrictions discriminate against AFDC recipients, and thus violate the equitable treatment requirement. (Appendix to Motion to Affirm).

As in *Ingerson*, the Secretary found that this position is consistent with *Quern* v. *Mandley*, *supra*. While a State EAF plan that is limited to AFDC families "is inherently reasonable," EAF discrimination against AFDC families is "particularly inconsistent with the purposes of the EA program — as the EA legislative history shows." (p.5). " . . . EA was largely intended to help AFDC recipients." (p.12).

The Secretary thus concluded that the contested New York provisions discriminate against AFDC families in violation of 45 C.F.R. § 233.10(a)(1), and that "[i]f New York is to continue to accept Federal funding for 50% or more of its AFDC and EA programs, then it must abide by the reasonable rulemaking which the Secretary has enacted in 45 C.F.R. § 233.10(a)(1)." (p.17). [10]

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[10] It is well settled that federal "agency regulations implementing federal statutes . . . pre-empt state law under the Supremacy Clause." *Chrysler Corporation* v. *Brown*, 441 U.S. 281, 295-296 (1979).

D. *The Secretary's Determination That The Contested New York Provisions Violate The Equitable Treatment Regulation Is A Reasonable Interpretation Of The Social Security Act And Is Consistent With Section 406(e) As Construed In Quern* v. *Mandley.*

The Secretary's regulatory policy is controlling because it is "reasonably related to the purposes" of the federal EAF statute. *Thorpe* v. *Housing Authority, supra* at 280-281. *Accord, Zenith Radio Corporation* v. *United States,* 437 U.S. 443, 450, 455 (1978). The "narrow inquiry" is whether the Secretary's "construction is 'sufficiently reasonable.' . . ." *Federal Election Commission* v. *Democratic Senatorial Campaign Committee,* 102 S.Ct. 38,46 (1981). "To satisfy this standard it is not necessary for a court to find that the agency construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 46; *Zenith Radio Corporation* v. *United States, supra* at 450; *Knebel* v. *Hein,* 429 U.S. 288,294 (1977); *Mourning* v. *Family Publications Serv.,* 411 U.S. 356,371-372 (1973). These well established standards apply where, as here, there is a broad delegation of general rulemaking power. *See, Chrysler Corp.* v. *Brown, supra* at 308; *Knebel* v. *Hein, supra; Mourning* v. *Family Publications Service, supra; Thorpe* v. *Housing Authority, supra; Public Utilities Comm.* v. *United States,* 355 U.S. 534 (1958); *American Trucking Ass'n.* v. *United States,* 344 U.S. 298,312 (1953); 2 Davis, *Adminstrative Law Treatise,* § 7.10, p. 54 (2d edition 1978).

The State Commissioner has contended that the equitable treatment regulation calls for the same review required by the Equal Protection Clause. But the Commissioner of Social Security of HEW rejected this position and determined that under the regulation "differences in treatment would be invalidated if not tailored to the purposes of the program."[11] This is consistent

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[11] This is a part of the HEW documentation in *Ingerson* v. *Sharp, supra,* which was submitted to the court below and lodged with this Court.

with the regulation, which refers to "inequitable treatment . . . in the light of the . . . purposes of the public assitance titles. . . ." In construing adminstrative regulations, "the ultimate criterion is the adminstrative interpretation, which becomes of controling weight unless it is plainly erroneous or inconsistent with the regulation." *United States* v. *Larinoff*, 431 U.S. 864, 872 (1977); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410,414 (1945).

The Secretary's policy of prohibiting EAF discrimination against AFDC families is the result of a carefully and deliberately developed policy, is consistent with prior interpretations of the "equitable treatment" policy, and, if accepted, avoids any necessity to pass upon the equal protection claims. *See. Townsend* v. *Swank*, 404 U.S. 282,291 (1971).[12] Most importantly, the Secretary's exercise of rulemaking authority is not inconsistent with section 406(e) as construed in *Quern* v. *Mandley, supra*, and is a reasonable construction of that statute.

The Illinois statute invovled in *Quern* limited eligibility for emergency assistance to persons eligible for AFDC who were "without shelter" or "in immediate need of clothing or household furnishings." *Quern* v. *Mandley, supra* at 730. The judgment reviewed in *Quern* enjoined the state defendants from "limiting eligibility for emergency assistance more narrowly than the provision of § 406(e), and . . . from denying emergency assistance . . to an needy child [who is eligible under the definition in § 406(e)]." *Id.* at 732. It enjoined the Secretary "from approving state plans for emergency assistance which limit eligibility more narrowly than § 406(e). . . ." *Id.* at 732-

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[12] In determining the weight that should be given to the agency's interpretation, consideration should be given to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

733. In view of the broad scope of the judgment, this Court defined the "ultimate question" as "whether a State *may ever* receive federal funds for a program of emergency assistance . . . if it limits eligibility for such aid more narrowly than the federal EA statute." *Id.* at 726-727 (emphasis added).

In reversing the judgment of the circuit court, this Court ruled that a state that accepts federal funds need not provide EAF for all emergencies within the scope of section 406(e). Congress "left the States broad discretion" in shaping their EAF programs and did not intend to "impose [ ] mandatory eligibility standards" on participating States. *Id.* at 744-745,747. A contrary ruling "would create an entirely open-ended program, not susceptible to meaningful fiscal or programmatic control by the States." *Id.* at 746.

Quern did not deal with the Secretary's rulemaking power to proscribe limitations on the "broad discretion" given to the states. This Court's holding that a state EAF plan need not cover all emergencies within the scope of section 406(e) is not equivalent to a holding that any and every conceivable state EAF plan is valid, regardless of how arbitrary it may be or how inconsistent it is with the purposes of the federal Act. A congressional grant of "broad state discretion" is not equivalent to a grant of unlimited discretion, and the equitable treatment doctrine is "a permissible limit upon the discretion otherwise allowed the States by § 406(e). . . ." (Brief of the Secretary, Amicus Curiae, p. 5a).

The Secretary's regulatory interpretation is reasonable in light of the Act's structure, language and purposes. *See, Zenith Radio Corp.* v. *United States, supra* at 450. There are two federal EAF provisions and each is set forth in Subchapter IV-A of the Social Security Act entitled "Aid to Families with Dependent Children." 42 U.S.C. §§ 603(a)(5), 606(e). Significantly, the provision defining EAF is located in the AFDC section entitled "definitions." 42 U.S.C. § 606(e). And, while the

phrase "needy families with children" in section 406(e) is broader than needy "families with dependent children," 42 U.S.C. § 606(b), it certainly encompasses these AFDC families.

The Senate and House Reports describe the families intended to be protected by the EAF program:

> "The eligible families involved are those with children under 21 who either are, or have recently been, living with close relatives. The families do not have to be receiving, or eligible upon application to receive, AFDC (although they are generally of the same type), but they must be without any available resources and the payment or services must be necessary in order to meet an immediate need that would not otherwise be met." S.Rep.No. 744, 90th Cong. 1st Sess; 1967, U.S. Code Cong. and Admin. News, pp. 3002-3003. *Accord*, H.Rep.No. 544, 90th Cong. 1st Sess., 1967, p. 109.

Thus, while Congress determined that a family need not be eligible for AFDC in order to receive EAF, it did contemplate that EAF would be available to protect AFDC families. *Lynch* v. *Philbrook*, 550 F.2d 793, 796 (2d Cir. 1977). Congress' placement of the substantive EAF provision in the AFDC definitional statute, its description of the families eligible for EAF, and the statements in the Senate and House Reports support the reasonableness of the Secretary's determination.

The court below concluded that the Secretary's position was inconsistent with *Quern* because it "requires a conclusion that what Congress gave to the states in section 406(e) it reclaimed in section 402(a)(5) by leaving the Secretary a residual authority to evaluate the states' decisions for 'arbitrariness,' 'unreasonableness,' or 'inequity.' " (J.S. 12a). This is inaccurate. The relevant question is whether Congress, in enacting section 406(e), intended to deprive the Secretary of his longstanding rulemaking power to prohibit state discrimination

that is antagonisitc to the purposes of a categorical program. There is no indication that Congress intended such a result. [13]

The Secretary may not exercise his rulemaking power in a manner that conflicts with section 406(e). He may not require a state that participates in the EAF program to cover all or any particular emergencies. He may not mandate that a state provide any particular mode of assistance. These are all matters within the realm of permissible state discretion. But the Secretary may disapprove state categorical provisions that he reasonably finds frustrates federal policy. The Secretary, therefore, may choose to prohibit state EAF discrimination against its most vulnerable, needy families, AFDC mothers with minor children.

II.

New York's EAF Plan Violates The Equal Protection Clause To The Extent That It Discriminates Against AFDC And Other Public Assistance Families.

New York families generally are eligible for EAF cash and services. But New York has singled out families eligible for AFDC for the automatic denial of cash EAF. In addition, while families who have been rendered destitute by a loss or theft of funds are generally eligible for EAF, public assistance families who have suffered a loss or theft of their public assistance are automatically denied EAF. Plaintiffs contend that the court below was correct in ruling that these are irrational classifications that violate the Equal Protection Clause.

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[13] In 1972, Congress rejected a proposal to limit the Secretary's rulemaking authority under Section 1102. The proposed amendment would have added that "no rule or regulation which affects Title IV, VI or XV of this Act shall be adopted unless such rule or regulation is related to a specific provision in such title and no rule or regulation so adopted shall be inconsistent with any provision of such title." S. Rep. No. 1230, 92 Cong. 2nd Sess., p. 889-890 (1972).

Since no fundamental constitutional right or suspect classification is involved, the rational basis test is applicable. *Schweiker* v. *Wilson*, 101 S.Ct. 1074 (1981); *Dandridge* v. *Williams*, 397 U.S. 471 (1970). The court below applied this test, recognizing "that in the area of social welfare legislation, states may draw lines, even imperfect ones, provided they rest on a rational basis and are free of invidious discrimination." (J.S. 14a). It also recognized that under such cases as *Dandridge* v. *Williams*, *supra*, and *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), "[i]f the classification has 'some reasonable basis,' it does not offend the constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " (J.S. 14a, quoting from *Dandridge* v. *Williams*, *supra* at 485).

This test gives deference to the legislative judgment and tolerates imperfectios. But "the standard by which legislation such as this must be judged 'is not a toothless one.' " *Schweiker* v. *Wilson*, *supra* at 1082; *Mathews* v. *Lucas*, 427 U.S. 495,510 (1976). State welfare provisions "must still be rationally based and free from invidious discrimination," *Hagans* v. *Lavine*, 415 U.S. 528,539 (1974), in order that "all persons similarly situated shall be treated alike.' " *Johnson* v. *Robison*, 415 U.S. 361,374-375 (19 Welfare legislation that does not meet these standards is ..nconstitutinal. *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974); *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973); *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973). *See also*, *James* v. *Strange*, 407 U.S. 128 (1972); *Lindsey* v. *Normet*, 405 U.S. 56,74-78 (1972); *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966).

In both the lower courts and in this Court the State Commissioner has argued that (1) the cash-services discrimination against AFDC families is justified by the State's provision of special grants to AFDC recipients, and (2) the loss-theft provision is justified by the State's difficulties in detecting fraud. This Court, therefore, should test the constitutionality of the

contested discrimination by the "purposes identified by the State," *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307,314 (1976), rather than by an "imaginary basis." *McGinnis* v. *Royster*, 410 U.S. 263,277 (1973).

A. *The Cash-Services Provisions.*

The New York Social Services Law generally contains no restrictions on the form of emergency assistance provided. DSS may provide emergency "aid, care and services," including "money payments," "payments in kind," "vendor payments" or "services." *N.Y. Social Services Law*, § 350-j(2); 42 U.S.C. § 606(e); 45 C.F.R. § 233.120(a)(2).

Thus, recipients of public assistance, recipients of other types of public benefits, as well as non-recipients of any public benefits, who claim that their families are destitute are generally eligible to receive emergency assistance "in whatever form is best for them . . . at their time of need." 113 Cong.Rec. 36924 (1967). New York, however, precludes families eligible for or receiving AFDC, and only these families, from receiving cash EAF, and limits these needy families to emergency "services" such as information, counselling and referral. *N.Y. Social Services Law*, §§ 350-j(2)(c), (3); 45 C.F.R § 233.120(a)(4).

The statute states, in the clearest of terms, that it is an EAF eligibility requirement that "in cases of applications for grants of cash assistance, such child or such household is not categorically eligible for or receiving aid to dependent children;. . . ." *N.Y. Social Services Law*, § 350-j(2)(c). This restriction is repeated in subdivision 3 of section 350-j, which states that "emergency assistance, but not including cash grants, may be furnished to a family eligible for aid to dependent children only in the form of emergency services, . . ." *N.Y. Social Services Law*, § 350-j(3).

The State Commissioner acknowledges that these two sections rendered "appellees, as AFDC recipients, ineligible for

such cash assistance. . . ." (Brief for Appellants, pp. 6-7). Had plaintiffs been recipients of any other form of public assistance, such as Home Relief, had they been recipients of any other type of public benefit, such as social security, SSI, unemployment insurance or public retirement benefits, or had they been non-recipients of any form of public income, they would not have been automatically barred from receiving cash EAF.

During the five years that this case has been litigated, neither the district court nor the court of appeals has been able to discern any rationale for this discrimination. Nor has the State Commissioner ever suggested one. The court of appeals stated that "[t]he Commissioner here makes no attempt to show that a valid purpose does underlie this provision. . . ." (J.S. 14a). Similarly, the district court stated that "[t]he state has offered no justification for this specific section in its brief, or in response to the court's inquiry." (J.S. 37-38a). And no basis for the discrimination appears in the statute's legislative history. (187-229a).

The State Commissioner's only argument is based on an affidavit of John Hickey, an official of the New York State Department of Social Services. (161-163a).[14] Mr. Hickey admits that "the statute does prohibit emergency assistance in the form of cash to [AFDC] recipients." (163a). But he states that there is no discrimination against AFDC recipients because "the *only* occasions in which emergency assistance in the form of cash would be provided to a Home Relief recipient would be for those situations in which an [AFDC] recipient would be

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[14] While defendant makes much of plaintiffs' failure to challenge this affidavit in the district court, it consists of nothing more than legal argument as to the meaning and intent of section 350-j. It does not contain the type of evidentiary matter that would require factual refutation by the plaintiffs. *Fed. R. Civ. P.*, 56(e) (affidavits in support of motions for summary judgment "shall set forth such facts as would be admissible in evidence. . . ."); 10 Wright and Miller, *Federal Practice and Procedure*, § 2738; 6 Moore, Federal Practice, ¶ 56.22[1], p. 56-1316.

eligible for a cash grant as part of the [AFDC] program." (163a).

This position has been rejected by the Secretary of HHS, by the district court, and by the three-judge panel of the Court of Appeals. The Secretary's brief in the Court of Appeals refers to subdivision (2)(c) of section 350-j as an "obviously discriminatory provision against AFDC recipients" which is "reinforced" in § 350-j(3), and describes the State's argument as a "non sequitur." (Brief of the Secretary, Appendix to Motion to Affirm, pp. 13-15a). Most importantly, the Secretay has demonstrated that Mr. Hickey's assertion is erroneous as a matter of law because "[a] need exists for emergency cash assistance for AFDC recipients that is not quickly met under the AFDC income maintenance program. That fact was a major impetus for the creation of the EA program.. . ." *Id.* at p.15a.

The Secretary's position is in accord with this Court's holding in *Quern* v. *Mandley*, *supra* at 737-739 that special needs grants are separate, distinct and "something quite different" from EAF. The federal regulatory requirement that EAF be furnished "forthwith," 45 C.F.R. § 233.120(a)(5), does not apply to AFDC special grants. *Mandley* v. *Quern*, 635 F.2d 659,661 (7th Cir. 1980). Similarly, the State regulatory mandate that EAF be "provided immediately," 18 N.Y.C.R.R. § 372.2, finds no counterpart with respect to New York's special grants. *See, N.Y. Social Services Law*, § 131-a(6). Thus, assuming, *arguendo*, that New York provided special grants to AFDC families for the same emergencies and items of need for which other families receive cash EAF, this would not cure the contested discrimination. The greater time allowed for processing special grant applications compared to EAF itself significantly discriminates against AFDC families.

Moreover, both the district court and the court of appeals found that Mr. Hickey's assertion that home relief recipients (and presumably other non-AFDC families) receive cash EAF

only for those items for which AFDC recipients receive special grants, is erroneous as a matter of New York law.

The district court found that there was no "support within New York's AFDC program" for the State Commissioner's argument and was unable to locate "any statute or regulation which provides cash emergency aid solely to AFDC recipients." (J.S. 38a). The circuit court viewed the State Commissioner's argument as "little more than *ipse dixit*, substantially varying the plain language of the statute." (J.S. 16a). After reviewing the relevant statute, the circuit court found that the State Commissioner's argument

> "is simply not correct. It is true, as the affidavit asserts, that N.Y.Soc.Serv.L. § 131-a(6) permits extraordinary relief to AFDC recipients, beyond regular monthly benefits, in certain defined circumstances — circumstances in which persons not receiving monthly AFDC benefits would be able to seek relief through the emergency assistance program. See id. § 350-j(3). But we cannot accept the contention that the two programs are coterminous. Section 131-a(6), for example, permits grants for replacement of furniture or clothing lost as the result of 'fire, flood or other like catastrophe'; it does not permit grants in cases of loss attributable to burglary, see, e.g., *Howard* v. *Wyman*, 28 N.Y.2d 434, 322 N.Y.S.2d 683, 271 N.E.2d 528 (1971), or public auction following eviction, see, e.g., *Orr* v. *Shang*, 66 A.D.2d 784, 410 N.Y.S.2d 654 (1978); *Nazario* v. *New York Commissioner of Social Services*, 37 A.D.2d 630, 323 N.Y.S.2d 618 (1971). Emergency assistance grants are not so limited, see *Orr* v. *Shang*, *supra* 66 A.D.2d at 784, 410 N.Y.S.2d 654. Furthermore, section 131-a(6) makes no provision for grants to meet food and other immediate living expenses — expenses for which grants can be made under the emergency assistance program." (J.S. 16-17a).

Where, as here, the resolution of the constitutional question is dependent upon an analysis of state law, this Court generally accepts "the interpretation of state law in which the District

Court and Court of Appeals have concurred. . . ." *Bishop* v. *Wood*, 426 U.S. 341,346 (1976). *Accord, Runyon* v. *McCrary*, 427 U.S. 160,182 (1976); *United States* v. *Durham Lumber Co.*, 363 U.S. 522,526-527 (1960); *Propper* v. *Clark*, 337 U.S. 472,486-487 (1949). The fact that the district judge and members of the court of appeals panel are all distinguished judges and former New York practitioners who were schooled in the intricacies of New York law, that they were in full agreement as to their analysis of the State law, and the fact that their analysis is supported by a decision of New York's highest court, *Howard* v. *Wyman*, 28 N.Y.2d 434 (1971), "are sufficient to foreclose [this Court's] examination of the state-law issue." *Bishop* v. *Wood, supra* at 347. [15]

An independent examination of the interplay of the EAF and the special grant statutes demonstrates that the courts below were correct in concluding that the two programs are not coterminous. New York's special grants cover neither all emergency events nor all items of need within the scope of sectin 350-j. For example, the special grant most nearly analogous to EAF, and the only one specifically relied upon by the State Commissioner, authorizes grants only to replace "furniture and clothing" and only in cases of "fire, flood or like catastrophe." *N.Y. Social Services Law*, § 131-a(6)(a). It does not cover such immediate needs as food, shelter, and medicine. No other special grant authorized by section 131-a(6) provides for these needs. By contrast, section 350-j is not so limited.

In addition, section 131-a(6)(a) is limited to the loss of furniture and clothing from "fire, flood and other like catastrophe." Neither this special grant no any other covers such emergency events as burglary, *Howard* v. *Wyman, supra*, confiscation of furniture following eviction, *Nazario* v. *Com-*

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[15] Where, as here, there is no unclear question of state law, abstention is inappropriate. *Kusper* v. *Pontikes*, 414 U.S. 51, 55-56 (1973); *Harman* v. *Forssenius*, 380 U.S. 528, 534-535 (1965).

missioner of Social Services, 37 A.D.2d 630 (2d Dept. 1971), or the destruction of furniture by an angry spouse, *Gaylord* v. *Toia*, 65 A.D.2d 730 (1st Dept. 1978).

The State Commissioner's argument is foreclosed by the decision of New York's highest court in *Howard* v. *Wyman*, *supra*. In that case, the court ruled that since the phrase "like catastrophe" in section 131-(a)(6)(a) "encompasses only a natural occurrence," it does not cover a burglary. *Howard* v. *Wyman*, *supra* at 437. The court noted that while petitioner did not qualify for a special grant, she might be eligible for EAF. *Id.* at 437-438 n.3. *Howard* makes it clear that one who is ineligible for a special grant may nevertheless be eligible for EAF. [16]

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[16] Indeed, there is a wide array of New York decisions in addition to *Howard* v. *Wyman*, *supra*, in which the courts have found that since there was no fire, flood or like catastrophe, the petitioner was not entitled to a special grant, but either was or may be eligible for EAF. *Orr* v. *Shang*, 66 A.D.2d 784, 410 N.Y.S.2d 654 (2d Dept. 1978)(furniture confiscated by landlord following eviction); *Gaylord* v. *Toia*, 65 A.D.2d 730, 410 N.Y.S.2d 295 (1st Dept. 1978)(furniture broken and removed by angry father); *Brown* v. *Lavine*, 47 A.D.2d 656, 364 N.Y.S.2d 33 (2d Dept. 1975)(furniture damaged by angry spouse); *Hatfield* v. *Lavine*, 42 A.D.2d 855, 346 N.Y.S.2d 845 (2d Dept. 1973)(furniture removed by husband); *Mitchell* v. *Wyman*, 39 A.D.2d 710, 331 N.Y.S.2d 958 (2d Dept. 1972)(request for single bed for child with fractured pelvis); *Velez* v. *Wyman*, 37 A.D.2d 770, 324 N.Y.S.2d 641 (1st Dept. 1971)(clothing and furniture lost in burglary); *Bates* v. *Wyman*, 36 A.D.2d 854, 321 N.Y.S.2d 664 (2d Dept. 1971)(furniture disposed of by foreclosing mortgagee); *Nazario* v. *New York Commissioner of Social Services*, *supra*, (clothing sold at auction following eviction); *Gamble* v. *Lavine*, 82 Misc.2d 444, 369 N.Y.S.2d 917 (Sup.Ct. Westchester Cty. 1975)(furniture damaged by mildew); *Knudsen* v. *Nassau County Department of Social services*, 77 Misc.2d 404, 352 N.Y.S.2d 853 (Sup.Ct. Nassau Cty. 1974)(clothing destroyed by parasitic pinworms). Of the cited cases, *Orr* v. *Shang*, *supra*, is the only one decided subsequent to the 1977 amendments to section 350-j. While it holds that the family is entitled to EAF, it does not discuss the form of assistance to which the family is entitled. It is clear that under the contested provisions, the Orr family would only be entitled to EAF "services."

In each of the instances in which the family was not entitled to a special grant, that family would be absolutely barred by the contested portions of subsection 350-j from receiving cash EAF solely by virtue of its status as a family eligible for AFDC. All other families would be eligible to receive EAF in any form.

Plaintiff Parrish is an AFDC recipient who was the victim of a theft, *inter alia*, of food. She was ineligible to receive EAF to replace the stolen food because of the cash-services provision. She was also ineligible for a special grant because section 131-a(6)(a) covers neither food nor thefts. Had she been a home relief recipient, or had she not been a recipient of public assistance, she would have been eligible for cash EAF. Despite the State Commissioner's protestations that AFDC families are not actually harmed by the cash-services discrimination, the Parrish family illustrates how AFDC families are injured by the contested provisions.

The only other State provision specifically mentioned in the Hickey affidavit is the pre-investigation grant authorized by section 133 of the Social Services Law. But that section only applies to assistance "pending completion of an investigation" of an application for public assistance. It thus does not apply to AFDC recipients or to families eligible for AFDC who do not desire to apply for ongoing assistance.[17] The State Commissioner's attempt to explain away the clear language of sections 350-j(2)(e) and (3) and her "ostensibly equal treatment of indigent[s] [thus] recedes sharply as one examines the statute[s] more closely." *James* v. *Strange*, 407 U.S. 128,135 (1972).

The fact that New York does not discriminate against AFDC families in its special grant program does not in any way justify or detract from its discrimination against those families in its EAF program. Home relief and AFDC recipients receive

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[17] A pre-investigation grant is distinguishible from EAF as a matter of State law. *Gutowski* v. *Lavine*, 44 A.D.2d 649, 353 N.Y.S.2d 281 (4th Dept. 1974).

recurring cash grants of assistance at the same level of benefits and are equally eligible for special grants. *N.Y. Social Services Law*, §§ 131-a(6)(a), 158, 159. Home relief families and all non-public assistance families are eligible for the most appropriate form of EAF. Only families eligible for AFDC are absolutely barred from receiving cash emergency assistance. This discrimination is "particularly unreasonable since [it] exclude[s] those who by definition are the very neediest element of society." (Brief of the Secretary of HHS, *supra* at 15a). The courts below correctly ruled that because there is no rational basis for this discrimination, it violates the Equal Protection Clause.

B. *The Loss-Theft Provision.*

Families in New York who are rendered destitute by the loss or theft of cash are generally eligible to receive emergency assistance. *N.Y. Social Services Law*, § 350-j. Families that depend upon such public funds as social security, SSI, unemployment insurance, workers' compensation, and railroad retirement benefits, as well as those that depend upon non-public funds like wages support payments and pensions, are eligible for EAF when a loss or theft of their income leaves them destitute. Their applications are individually evaluated by DSS to determine whether there was a loss or theft, whether the family is destitute, and whether the other eligibility requirements of section 350-j are met.

Public assistance families, including those receiving AFDC, however, are automatically denied EAF. *N.Y. Social Services Law*,§ 350-j(2)(e). This subsection provides that "in the case of a person receiving public assistance" it is an eligibility requirement that destitution "did not result from the loss [or] theft . . . of a regular public assistance grant."

Throughout this litigation, the State Commissioner has "persistently maintained" that this exclusion is "designed only to prevent fraudulent claims." *Jimenez* v. *Weinberger*, 417 U.S. 628, 636 (1974). The State Commissioner made this

argument in the district court (18a), in her brief in the Court of Appeals, (pp. 11-12), in her Jurisdictional Statement, pp. 10-11, and in the Brief for Appellant (p. 19).

It is, of course, a simple matter for any state simply to assert that the avoidance of fraudulent claims justifies discrimination. The indiscriminate acceptance of this assertion, however, would make the Equal Protection Clause virtually inapplicable in public benefits cases since a state could seek to justify virtually any discrimination on this basis. These considerations have undoubtedly played a significant role in this Court's decisions holding discrimination unconstitutional where the discriminated and favored classes have an equal potential for fraud. *Jimenez* v. *Weinberger, supra; United States Department of Agriculture* v. *Murry, supra; United States Department of Agriculture* v. *Moreno, supra. See also, James* v. *Strange,* 407 U.S. 128 (1972); *Lindsey* v. *Normet,* 405 U.S. 56, 74-78 (1972).

As the court below recognized, there is no question that New York has a legitimate interest in avoiding fraudulent claims. *Jimenez* v. *Weinberger, supra; Shapiro* v. *Thompson,* 394 U.S. 618,637 (1969). This interest might be sufficient to sustain the constitutionality of a statute denying EAF in *all* cases of loss or theft of cash. But that is not what New York has done. Rather, New York denies EAF automatically only to families claiming loss or theft of public assistance funds. The State's legitimate interest in avoiding fraudulent claims does not provide a rationale for discriminating against recipients of public assistance. *Jimenez* v. *Weinberger, supra.*

Neither in the courts below nor in her Jurisdictional Statement did the State Commissioner make any attempt to suggest any rationale for the different treatment afforded the two classes. Nor did the State Commissioner ever suggest that public assistance families were more likely to submit a fraudulent claim than other families. The State Commissioner thus litigated this case on the erroneous assumption that a legitimate

state interest was all that was necessary. The Equal Protection Clause requires more. "It also imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi* v. *Yeager*, 384 U.S. 305,308-309 (1966).

It was not until the filing of her "Reply to Motion to Affirm" in this Court did the State Commissioner argue that while "rich and poor are, as a group, equally honest, it is an equally safe assumption . . . that more welfare recipients than recipients of paychecks would attempt to defraud the Emergency Assistance program of cash by falsely alleging a lost or stolen check" because welfare recipients are "familiar" with the public assistance system. (Reply to Motion to Affirm, p.5). This is repeated virtually verbatim on page 20 of the Brief for Appellant.

By failing to present this argument to the courts below, the State Commissioner has deprived them of the opportunity to assess it. Cf. *Whiteley* v. *Warden*, 401 U.S. 560,569 (1971). And, the fact that this argument "is so obviously an afterthought may be some indication of its merit, . . ." *Miree* v. *DeKalb County*, 433 U.S. 25,33-34 (1977). While the State Commissioner characterizes her argument as based on a "safe assumption", in actuality, it is nothing more than "the Government's wholly unsubstantiated assumptions concerning the differences between [public assistance] and [non-public assistance] households. . . ." *United States Department of Agriculture* v. *Moreno, supra* at 535.

There is no basis in fact or in law to "assume" that recipients of public assistance who claim destitution from a loss or theft are more likely to submit a fraudulent claim than are non-recipients who claim destitution from a loss or theft. This Court has recognized that whether a person is likely to submit a fraudulent claim depends on that person's ethics, morality, and disposition to commit fraud rather than on his or her status. For example, in *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250,269 (1974), the Court observed that "[a]n indigent appli-

cant [for medical benefits] *intent on committing fraud*, could as easily swear to having been a resident of the county for the preceding year as to being one currently." (emphasis added). *Accord, Dunn* v. *Blumstein*, 405 U.S. 330,352 (1972).[18]

The State Commissioner concedes, as she must, that morality is not related to income status. (Brief for Appellants, p.20). This Court rejects the notion that "because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous." *Edwards* v. *California*, 314 U.S. 160,177 (1941). Those who are "stigmatized by a State as indigents, paupers or vagabonds" cannot be "relegated to an inferior class of citizenship", *ibid.* at 181 (Justice Douglas, concurring), because " '[i]ndigency' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact — constitutionally an irrelevance, like race, creed or color." *Ibid.* at 184-185 (Justice Jackson, concurring). Since poverty and immorality are not synonymous, "legislative judgments equating them, therefore, cannot be sustained as rational." Tribe, *American Constitutional Law*, § 16-34, pp. 1099-1100 (1978).

A 1973 HEW study revealed that "evidence of fraud" existed "in less than one half of one percent of all open [public assistance] cases. . . ." *National Welfare Rights Organization* v. *Weinberger*, 377 F.Supp. 861,865 n.3 (D.D.C. 1974). Thus, "[t]here is little indication that fraud is a frequent occurrence. . . ." *Morgan* v. *Maher*, 449 F.Supp. 229,233 (D.Conn. 1978), *aff'd*, 591 F.2d 1331 (2d Cir. 1978). Since welfare recipients are typically honest, *Owens* v. *Roberts*, 377 F.Supp. 45,53 (M.D.Fla. 1974) (three-judge court), there is no reason for New York to treat them differently than other persons.

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[18] In that case, the Court stated that "if it is unlikely that would-be fraudulent voters would remain in a false locale for the lengthy period imposed by durational residency requirements, it is just as unlikely that they would collect such objective indicia of bona fide residence as a dwelling, car registration, or driver's license." *Id.* at 352.

The State Commissioner's only argument is that public assistance recipients, because of their "familiarity" with the welfare system, have a greater "opportunity" to apply for EAF. But the opportunity is equally available to both classes, since both public assistance and non-public assistance families who claim destitution are equally eligible for EAF. *Quern* v. *Mandley, supra* at 729. Both recipients and non-recipients know that there is a Department of Social Services to which one may turn for aid at a critical time.

If anything, a welfare recipient's familiarity with the welfare system makes it less likely that a fraudulent claim would be submitted. Welfare recipients know from experience about the rigorous verification and investigation of applications, 18 N.Y.C.R.R. Part 351,[19] they know that fraudulently obtained grants may be recouped, *N.Y. Social Services Law*, § 106(b); 18 N.Y.C.R.R. § 348.4, and that fraud cases may be referred to the district attorney for criminal prosecution. *N.Y. Social Services Law*, § 145; 18 N.Y.C.R.R. Part 348.

The State Commissioner contends that it is often "impossible" to detect fraud because "immediate" action is necessary. If it is truly impossible, it is equally impossible with respect to non-public assistance families. In fact, it is easier for DSS to detect fraud in the case of the recipient because DSS has already fully verified and investigated the recipient's application for on-going assistance. *N.Y. Social Services Law*, § 132; 18 N.Y.C.R.R. Part 351. As part of the normal process of investigating eligibility for recurring grants of public assistance, DSS is required to determine such "aspects of eligibility" as identity, residence, family composition, shelter costs, available income and resources, need, and alternate means of subsistence. 18 N.Y.C.R.R. §§ 351.1-351.2. All of these factors are relevant in determining the bona fides of an application for

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[19] Applicants of EAF bear the burden of establishing eligibility. *Matter of Woodley*, 54 A.D.2d 912, 388 N.Y.S.2d 310 (2d Dept. 1976).

EAF. In addition, since DSS has an on-going relationship with the recipient, it has a greater facility to obtain data from and about the recipient.

In sharp contrast to an EAF application by a recipient, when a non-recipient applies for EAF, DSS must first determine all aspects of eligibility and must make these determinations "immediately." 18 N.Y.C.R.R. § 372.2(a).[20] This fact, plus the fact that DSS does not have an on-going relationship with the non-recipient, means that D. S has a lesser ability to gauge the validity of the claim in the case of a non-recipient than in the case of a recipient.

There is nothing in the makeup of the individuals in the two classes that provides any reason for concluding that DSS takes a greater risk with one class than the other. In fact, the characteristics of the two classes are strikingly similar. The Senate and House Reports recognize that non-recipient and recipient families who apply for EAF "are generally of the same type. . . ." S.Rep. No. 744 90th Cong. 1st Sess., 1967 U.S. Code Cong. & Admin. News, pp. 3002-03; H.Rep. No. 544, 90th Cong. 1st Sess., 1967, p.109. Both groups consist of families "with children under 21 who either are, or have recently been, living with close relatives" and are "without any available resources and the payments or services must be necessary in order to meet an immediate need. . . ." *Id.*

The excluded class contains intact families receiving AFDC due to the incapacity of a parent who is unable to provide support or care, 42 U.S.C. § 606(a), while the favored class contains similar intact families receiving social security disability benefits due to the impairment of a parent who is unable to engage in substantial gainful activity, 42 U.S.C. § 423. The excluded class also contains families receiving AFDC-U bene-

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[20] See 18 N.Y.C.R.R. § 372.5 which requires a written application for non-recipients who apply for EAF but which states that "no additional application is required" when a recipient applies for EAF.

fits due to the recent unemployment of a parent who is available for work, 42 U.S.C. § 607, *N.Y. Social Services Law*, § 349(A)(4)(1-a), while the favored class contains virtually identical families receiving unemployment insurance benefits due to the recent displacement of a parent who is ready, willing and able to work. *N.Y. Labor Law*, § 591. And, just as the excluded class contains AFDC families with an absent or deceased parent, the favored class contains a multitude of one-parent households such as those receiving social security in the form of widows or widowers benefits, 42 U.S.C. §§ 402(e), (f), and child survivors benefits, 42 U.S.C. § 402(d), those receiving civil service retirement benefits, 5 U.S.C. § 8331, and those receiving railroad retirement benefits, 45 U.S.C. § 231. Moreover, both classes contain large numbers of single parent families receiving child support payments. [21]

Despite the overwhelming similarities between the two classes, recipients of social security, workers' compensation, unemployment insurance, SSI, civil service retirement and railroad retirement benefits and those that receive child support, wages and pensions are all eligible for a grant of emergency assistance, while recipients of AFDC, AFDC-U and Home Relief are not.

This Court's decisions support the conclusion that where the relevant state interest is fraud, a State must afford even-handed treatment to classes with the same potential for fraud, and that its failure to do so violates the Equal Protection Clause. *Jimenez v. Weinberger, supra; United States Department of Agriculture*

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[21] Large numbers of families in the favored class are likely to be former recipients of public assistance in view of the well recognized turnover in the welfare population. Boskin and Nold, *A Markov Model of Turnover in Aid to Families With Dependent Children*, 10 Journal of Human Resources, 467 (1975). A recent report of the New York City Human Resources Administration concludes that "public assistance is a temporary source of income for many recipients." Dixon and Storfer, *Trends in the Characteristics of AFDC Families in New York City*, 1969-1979, p.38 (November 1981).

v. *Moreno, supra; United States Department of Agriculture* v. *Murry, supra; James* v. *Strange, supra; Lindsey* v. *Normet, supra. See also, United States* v. *Clark*, 445 U.S. 23 (1980).

In *Jimenez* v. *Weinberger, supra*, this Court, by an eight to one vote, ruled that equal protection was violated by a federal statute that automatically denied one class of illegitimate children benefits, though not another class of illegitimate children. After recognizing "that the prevention of spurious claims is a legitimate governmental interest", the Court found that

> "it does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. . . . *(F)or all that is shown in this record*, the two subclasses of illegitimates stand on an equal footing, and the potential for spurious claims is the same as to both; hence, *to conclusively deny one subclass of benefits presumptively available to the other denies the former the equal protection of the laws.*" *Jimenez* v. *Weinberger, supra* at 635-636 (emphasis added).

While *Jimenez* deals with discrimination against a class of illegitimate children, the Court did not hold that their equal protection rights were violated because they were treated differently than legitimate children, but because they were treated differently than a second "subclass[ ] of afterborn illegitimates. . . ." *Id.* at 636. The decision would thus appear to be based on the rational basis test. *Jimenez* v. *Weinberger, supra* at 638 (Justice Rehnquist, dissenting). While subsequent opinions have referred to *Jimenez* as a rational basis case and others as an illegitimacy case, [22] the overriding principle is that it is simply irrational for government to afford different treatment to two classes with an equal potential for fraud.

The rationale of *Jimenez* is applicable to the instant case because there is nothing in the record "to establish that public

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[22] Compare, e.g., *Weinberger* v. *Salfi*, 422 U.S. 749, 772 (1975), with *Mathews* v. *Lucas, supra* at 506.

assistance recipients have a greater propensity than others for asserting fraudulent claims of lost or stolen funds. . . ." (J.S. 18a). The Secretary of HHS, who has great expertise in this area, told the court below that: "The chances of fraud where a person claims to have lost his paycheck or workmen's compensation check are the same as those where a person claims to have lost a public assistance check. To think otherwise is to indulge in a factually unsubstantiated assumption that welfare recipients are unusually larcenous." (Brief of the Secretary as Amicus Curiae, Appendix to Motion to Affirm, pp.16-17a).

In *Lindsey* v. *Normet*, 405 U.S. 56,74-78 (1972), this Court recognized that while an appeal bond furthered the legitimate state interest of preventing frivolous appeals, Oregon's imposition of an additional bond only with respect to tenant-appellants "arbitrarily discriminate[d] against tenants appealing adverse decisions" in violation of the Equal Protection Clause. *See also*, *James* v. *Strange*, *supra*. The same reasoning applies here.

The State Commissioner's reliance on *Weinberger* v. *Salfi*, *supra*, is misplaced. The "nine month" rule at issue there constituted an "objective criterion" by which to gauge the validity of a marriage, and it was rational for the Government to conclude that those who were married for less than nine months presented a greater potential for fraud than those who were married for more than nine months. It was thus permissible for the Government to distinguish between the two groups.[23]

The State Commissioner asserts that "it was New York's intent to adopt a program to deal with emergencies, not to

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[23] The Court also observed that because of numerous statutory exceptions to the nine-month rule, it operated "only within a somewhat narrow range of situations lacking certain characteristics which might reasonably be thought to establish the genuineness of a marital relationship. . . ." *Weinberger* v. *Salfi*, *supra* at 780. This is not true about the contested statute in this case. Cf. *Lalli* v. *Lalli*, 439 U.S. 259 (1978), where the Court observed that while proving maternity is seldom difficult, there are "peculiar problems" in proving paternity. *Id.* at 268-269.

supplement regularly recurring public assistance." (Brief for Appellants, p.22.) But the New York plan, by authorizing EAF cash and services to Home Relief families and EAF services to AFDC families, recognizes that like non-recipient families, public assistance families may suffer emergencies and that EAF is necessary to avoid their destitution.

Ultimately, the State Commissioner acknowledges that the purpose of the statute is to promote "the political acceptability of welfare to the taxpaying public." (Brief for Appellant, p. 19.) But this Court has held that "a state may not employ an invidious discrimination to sustain the political viability of the program." *Memorial Hospital* v. *Maricopa County*, *supra* at 266.

Plaintiffs acknowledge that EAF is limited to sudden and unforeseen emergencies and that State plans may restrict coverage to specific emergencies. Plaintifffs ask only that New York, in administering its EAF plan, not discriminate against its neediest families. The court below was correct in ruling that this discrimination is irrational and violative of the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully pray that the judgment of the court below be affirmed.

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